(10)

No. 97-1147-CSY Title: Minnesota, Petitioner
v.
Wayne Thomas Carter
and
Minnesota, Petitioner
v.
Melvin Johns

Docketed:
January 9, 1998

Court: Supreme Court of Minnesota

Entry	Date	Proceedings and Orders
	Dec 29 1997	Petition for writ of certiorari filed. (Response due February 8, 1998)
	Feb 6 1998	Brief of respondents Wayne Carter and Melvin Johns in opposition filed.
	Feb 18 1998	DISTRIBUTED. March 6, 1998
	Mar 9 1998	Petition GRANTED. SET FOR ARGUMENT October 6, 1998. **********
	Apr 2 1998	Order extending time to file brief of petitioner on the merits until May 14, 1998.
	May 14 1998	Brief amici curiae of Alabama, et al. filed.
	May 14 1998	Joint appendix filed.
	May 14 1998	Brief of petitioner Minnesota filed.
	May 14 1998	Brief amicus curiae of United States filed.
	Jun 10 1998	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Jun 15 1998	Brief of respondents Wayne Carter and Melvin Johns filed.
	Jun 25 1998	Motion of Solicitor General for leave to particiipate in oral argument as amicus curiae and for divided argument filed.
	Jul 14 1998	Reply brief of petitioner Minnesota filed.
	Aug 11 1998	CIRCULATED.
	Aug 14 1998	Record filed.
	Aug 14 1998	Record filed.
	Aug 27 1998	Motion of Solicitor General for leave to particiipate in oral argument as amicus curiae and for divided argument GRANTED.

Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA,

Petitioner,

vs.

WAYNE THOMAS CARTER, AND
MELVIN JOHNS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an invitee into a residence, whose sole purpose for being present is to assist the resident in an illegal activity, has a legitimate expectation of privacy while within the residence under the Fourth Amendment to the United States Constitution.

Whether a police officer's non-enhanced use of his natural senses to observe criminal activity in a residence from a public area outside the curtilage of the residence is a search under the Fourth Amendment to the United States Constitution.

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Other Authorities:

1 Wayne R. LaFave, *Search and Seizure*, §2.3(c) at 480 (3d ed. 1996) 24

5 Wayne R. LaFave, *Search and Seizure*, §11.3(b), n.71 at 134-135 (3d ed. 1996) 15

1 Wayne R. LaFave, *Search and Seizure*, §2.3(d) at 495, 497 (2d ed. 1987) 27

OPINIONS BELOW

The opinion of the Minnesota Supreme Court in *State v. Carter* (App., *infra*., pp. A1-A28) is reported in 569 N.W.2d 169 (Minn. 1997). The opinion of the Minnesota Supreme Court in *State v. Johns* (App., *infra*., pp. B1-B2) is reported in 569 N.W.2d 180 (Minn. 1997). The opinion of the Minnesota Court of Appeals in *State v. Carter* (App., *infra*, pp. C1-C8) is reported at 545 N.W.2d 695 (Minn. Ct. App. 1996). The opinion of the Minnesota Court of Appeals in *State v. Johns* (App., *infra*, pp. D1-D5) (No. C9-95-1765, 1996 WL 310305 (Minn. Ct. App. June 11, 1996)) is unpublished. The opinions of the District Court (App., *infra*, pp. E1-E7) are unreported.

JURISDICTION

The Minnesota Supreme Court filed its opinions in both cases on September 11, 1997. Under Rule 136.02 of Minnesota Rules of Civil Appellate Procedure entry of the judgments is automatically stayed for a period of 30 days. The Minnesota Supreme Court's judgment on respondent Carter was entered on September 29, 1997. Upon motion of respondent Johns, the Minnesota Supreme Court entered his judgment on October 1, 1997. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(a)(1997).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

> upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person life, liberty, or property, without due process of law.

STATEMENT OF CASE

A. Statement of Facts.

On May 15, at approximately 8 p.m., Officer Jim Thielen of the Eagan Police Department, while working stationary radar patrol, was approached by an individual with information regarding illegal drug activity. The individual, whom the officer had never met before, told the officer that he/she had just walked by a nearby apartment window and observed people sitting around a table in the apartment "bagging" a white powdery substance. The individual also advised Officer Thielen that he/she believed the occupants of the apartment were using a blue four-door Cadillac with Illinois license plates which was parked in the apartment complex parking lot.

Upon receiving the above information Officer Thielen immediately went to the apartment complex. Officer Thielen approached the apartment which was on the lower level of the building. The officer, while standing on a common grassy area within 12 to 18 inches of the apartment window, was able to look through a gap in the window blinds which were closed. Upon doing so Officer Thielen observed two males and one female sitting at a kitchen table. The officer observed one of

the males place a white powdery substance onto the kitchen table. This person would then pass the substance to the second male who would place the powder in a plastic bag. The second male would in turn give the plastic bag to the female who would cut off the ends of the bag and put it on a pile on the table. Officer Thielen observed the operation for approximately 10 to 15 minutes during which time 5 or 6 bags were filled.

After making the above observations Officer Thielen left the apartment complex. While doing so he observed a blue Cadillac with Illinois plates in the parking lot. Upon returning to his original location he had a second conversation with the individual who had initially reported the illegal drug activity in the apartment. During this second conversation the individual advised the officer that he/she believed the occupants of the apartment also had a gun. Officer Thielen contacted Investigator Kevin Kallestad of the South Metro Drug Task Force and told him of the initial report and his subsequent observations. Investigator Kallestad advised Officer Thielen that he would attempt to obtain a search warrant for the apartment and the Cadillac. Investigator Kallestad instructed Officer Thielen to stop and secure the Cadillac should anyone attempt to drive away in it while he was attempting to obtain the search warrant.

At approximately 10:30 p.m., a police officer observed two males putting items into the above Cadillac. The two males got into the vehicle and drove away. Police officers stopped the vehicle a short distance away. Police identified the driver of the vehicle as respondent Carter. The passenger of the vehicle was identified as the respondent Johns. Police ordered both men out of the Cadillac. As police opened the passenger door to let Johns out they observed in plain view a black zipper pouch and a hand gun on the floor the vehicle. The gun was later determined to be loaded. Both Carter and Johns were placed under arrest and the Cadillac was towed to

a Eagan Police Department where it was eventually searched after officers obtained a search warrant for the vehicle and the apartment. While officers were executing the search warrant they found approximately 47 grams of cocaine in the black pouch, identification papers for Johns, pagers and a duffel bag containing a digital scale with trace amounts of cocaine.

Officers also executed the search warrant on the apartment. At the time the lessee of the apartment, Kimberly Thompson, was present. Officers found cocaine residue on the kitchen table and baggies similar to those found in the Cadillac. Officer Thielen was able to identify Carter, Johns and Thompson as the same individuals he had observed through the window bagging cocaine. Through subsequent identification officers were able to determine that both Carter and Johns were residents of Chicago, Illinois. In a statement to police Carter admitted that he owned a duffel bag in the Cadillac in which officers found the scale. Johns also provided police with a statement in which he admitted that he had agreed to transport cocaine from Chicago to Minnesota for money. Johns further admitted that he along with Carter and Thompson had been packaging the cocaine in Thompson's apartment before the police stopped them. Johns also acknowledged that he was aware that there was cocaine and a handgun in the Cadillac at the time they were stopped by police.

On May 17, 1994 the respondents were charged with the crimes of Conspiracy to Commit Controlled Substance Crime in the First Degree pursuant to Minnesota Statutes section 152.021, subd. 1(1); 609.05 (conspiracy to possess with the intent to sell 10 or more grams of a mixture containing cocaine) and Controlled Substance Crime in the First Degree Aiding and Abetting pursuant to Minnesota Statutes section 152.021, subd. 2(1); 609.05 (aiding and abetting another to possess 25 grams or more of a mixture containing cocaine.)

B. How the Federal Question Was Presented.

Both respondents made motions to the Trial Court to suppress their statements and all evidence seized from the vehicle and apartment. Respondents argued Officer Thielen's observations through Thompson's apartment window was an unreasonable search under the Fourth Amendment. Respondents went on to argue that because of the unconstitutional nature of Officer Thielen's actions any evidence derived from such observations should also be excluded.

The Trial Court determined that respondent's did not have standing under the Fourth Amendment to object to the Officer Thielen's observations into the apartment of Kimberly Thompson. The Trial Court concluded both respondents failed to present evidence of an expectation of privacy in the apartment based upon "understandings that are recognized and permitted by society." "Order Pursuant to Omnibus Hearing" quoting *Rakas V. Illinois*, 439 U.S. 128, 143-44 n.12, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)(App., *infra*.,p E-8) In reaching its decision the Trial Court noted that the only evidence presented by the defense showed that the respondents were out-of-state residents who had been at the apartment for a period of time on May 15, 1994. The Trial Court also concluded that Officer Thielen made his observations from an area in which the respondents had no reasonable expectation of privacy. *Id.*, (App., *infra*., p.E-8 and E-12) The respondents preceded to trial on stipulated facts and were found guilty of both offenses.

Both respondents appealed their convictions to the Minnesota Court of Appeals challenging the lawfulness of Officer Thielen's observations through the apartment window. The appeals were reviewed by two separate panels of judges. In regard to respondent Carter, the Minnesota Court of Appeals held that Carter did not have standing to object to the

officer's observations as his claim that he was predominately a social guest is "inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose--to package drugs." *State v. Carter*, 545 N.W.2d 695, 698 (Minn. Ct. App. 1996)(App., *infra.*, p. C-6). In regard to Johns, a second judicial panel of the Minnesota Court of Appeals did not determine the issue of standing, holding that such a determination was unnecessary as under the totality of the circumstances because there existed sufficient probable cause to believe that criminal activity would be found and the officer's looking into the apartment window was part of a logical in the field investigative technique which the courts give deference because there existed sufficient probable cause to believe that criminal activity would be found. *State v. Johns*, unpublished, (App., *infra.*, pp. D-4 - D-5)

Respondents appealed the decisions of the Minnesota Court of Appeals regarding the lawfulness of Officer Thielen's observations to the Minnesota Supreme Court. The Minnesota Supreme Court, in a 4 to 3 decision, specifically held that under the Fourth Amendment of the United States Constitution and the related state constitutional provisions, both respondent's had standing to challenge the legality of Officer Thielen's observations.[1] The Court noted that

[1] When a state court decision appears to rest primarily on federal law and when the adequacy and independence of any possible state law is not clear from the face of the opinion a reliance on federal law is presumed absent a clear statement by the state court to the contrary. *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). The Minnesota Supreme Court has in the past adopted the practice of specifically stating in its opinion if the decision of the Court is to be based on independent state constitutional provisions. See, *State v. Scales*, 518 N.W.2d 587 (Minn. 1994)(requiring under the Minnesota Constitution that all custodial interrogations be electronically recorded) and *In re E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993)(rejecting the United States Supreme Court's opinion in *California v. Hodari*, 499

respondents had permission from the leaseholder to be in the apartment and remained in the apartment for two and one half hours performing a common task with the leaseholder. In it's decision the majority conceded that society does not recognize as valuable the task of packaging cocaine for distribution. However, the majority reasoned that because society does recognize as a valuable right the ability of residents to invite people into their homes to conduct a common task, be it legal or illegal, respondent's had a legitimate expectation of privacy in the apartment. The Court went on to conclude that Officer Thielen took extraordinary measures when he left the sidewalk, walked across the grass, stood approximately 12 to 18 inches from the window and looked between a gap in the window blinds. Thus Officer Thielen violated the respondents expectation of privacy in the apartment irrespective of whether or not he made his observations from an area outside the curtilage of the apartment. The Court also concluded that the Officer Thielen's warrantless observations were not supported by probable cause and reversed the decisions of the lower courts. *State v. Carter*, 569 N.W.2d 169, 178 (Minn. 1997)(App., *infra*, pp. A-1 - A-24) and *State v. Johns*, 569 N.W.2d 180 (Minn. 1997)(App., *infra*, pp. B-1 - B-2).

REASONS FOR GRANTING PETITION

I. IN CONCLUDING THAT A DEFENDANT HAS A LEGITIMATE EXPECTATION OF PRIVACY IN THE RESIDENCE OF A CO-CONSPIRATOR WHERE THE SOLE PURPOSE FOR BEING PRESENT IN THE RESIDENCE AT THE TIME OF A SEARCH IS TO ENGAGE IN ILLEGAL ACTIVITIES, THE MINNESOTA SUPREME

U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) on state constitutional grounds)

COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW CONTRARY TO RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT.

Under the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In the instant case the Minnesota Supreme Court has determined that a guest or invitee who is engaged a common task with one who has a possessory or proprietary right in a premises has a legitimate expectation of privacy protected by the Fourth Amendment irrespective of whether or not the common task is legal or illegal.

Evidence obtained in violation of the Fourth Amendment must be excluded at trial. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). However, the Supreme Court has repeatedly noted that an unfettered application of the exclusionary rule is detrimental to our society and system of justice.

> The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of

> probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth. Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected.

Rakas v. Illinois, 439 U.S. 128, 137, 99 S.Ct. 421, 427, 58 L.Ed.2d 387 (1978) quoting *Alderman v. United States*, 394 U.S. 165, 174-175, 89 S.Ct. 961, 967, 22 L.Ed.2d 176 (1976). See also, *United States v. Ceccolini*, 435 U.S. 268, 275, 98 S.Ct. 1054, 1059, 55 L.Ed.2d 268 (1978); *Stone v. Powell*, 428 U.S. 465, 489-490, 96 S.Ct. 3037, 3050, 49 L.Ed.2d 1067 (1976); and *United States v. Calandra*, 414 U.S. 338, 348-352, 94 S.Ct. 613, 620-622, 38 L.Ed.2d 561 (1974). Mindful of "social costs" associated with the implementation of the exclusionary rule, the Supreme Court has rejected concepts such as "target standing" in cases where it can be shown that the search was directed at the defendant and "automatic standing" where a possession is an essential element of a crime. See respectively, *Rakas v. Illinois*, *supra*, 439 U.S. 128, 132-134, 99 S.Ct. 421, 424-427, 58 L.Ed.2d 387 (1978) and *United States v. Salvucci*, 448 U.S. 83, 94-94, 100 S.Ct. 2547, 2554, 65 L.Ed2d 619 (1980).

Since its landmark decision in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) the United States Supreme Court has consistently applied a two part analysis in determining if an individual has standing to object to an unreasonable search under the Fourth Amendment. The first is whether the defendant by his conduct has exhibited a subjective expectation of privacy. The second is whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable. *Smith v. Maryland*, 442 U.S. 735, 741-742, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979) quoting *Katz*, *supra*, 389 U.S. at 353, 88 S.Ct. at 512, 19 L.Ed.2d 576. See, *Rakas v. Illinois*, *supra*, 439 U.S. at 143-144 n.12, 99 S.Ct. at 430, 58 L.Ed.2d 387 (1978). The Court has also made it clear that its analysis is to be based upon an examination of all the facts and circumstances surrounding the defendant's particular standing claim. *Oliver v. United States*, *supra*, 466 U.S. at 170, 177, 104 S.Ct. 1735, 1740, 80 L.Ed.2d 214 (1984) and *United States v. Salvucci*, *supra*, 448 U.S. at 91-93, 100 S.Ct. at 2552-2553, 65 L.Ed.2d 619. The burden is upon the defendant to present sufficient evidence establishing his or her rights under the Fourth Amendment. *Jones v. United States*, 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697 (1960). See also, *Rawlings v. Kentucky*, 448 U.S. 98, 104, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980).

While it is clear that persons who live in or have other possessory interests in a residence may seek the protections of the Fourth Amendment, the ability of guests and other invitees to assert the same protections is less certain. As the United States Supreme Court has stated, "One's rights under the Fourth Amendment are personal rights that cannot be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 966-967, 22 L.Ed.2d 176 (1969) citing *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967,

19 L.Ed.2d 1247 (1968) and *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).

The United States Supreme Court first examined whether invitees or guests had standing to object to a search under the Fourth Amendment of another's premises in the case of *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).[2] In *Jones* the majority concluded that a defendant who is a guest or invitee will always have standing to object to an unreasonable search and seizure under the Fourth Amendment if the same possession necessary to establish standing is an essential element of the offense or if the person is "legitimately on the premises" at the time of the search. *Id.*, 362 U.S. at 267, 80 S.Ct. at 734, 4 L.Ed.2d 697. The Court reasoned that to hold contrary would require a defendant in establishing a right under the Fourth Amendment to also acknowledge an essential element to the offense he was charged, i.e. possession of the premises or narcotics. The Court concluded that its decision was necessary to prevent the state from obtaining an "unfair advantage" of alleging the defendant unlawfully possessed the narcotics yet prohibiting the same defendant from challenging the search absent his making incriminating statements as to the essential element of possession. *Id.*, 362 U.S. at 263-263, 80 S.Ct. at 732, 4 L.Ed.2d 697.

The *Jones* Court's concern over the state's advantage of contradictory positions was diminished in the case of *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).[3] Once again the Court pointed out that for the

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[2] In *Jones* the defendant was present at the time of the search, the apartment's tenant had been gone for approximately 5 days but had given defendant a key for the apartment and permission to use the apartment while he was away.

[3] In *Simmons* the defendant had been indicted for armed robbery and sought to challenge the search of a codefendant's mother's residence

defendant to assert standing to contest the search under the Fourth Amendment on a possessory crime he would in effect be forced to give up his Constitutional right against self incrimination. In the view of the majority such a position is "intolerable". To rectify the dilemma the Court went on to hold that when a defendant testifies in a motion to suppress evidence under the Fourth Amendment, his testimony may not be admitted against him at trial. *Id.*, 390 U.S. at 393-394, 88 S.Ct. at 976, 19 L.Ed.2d 1247. Therefore, the need for automatic standing when a defendant was charged with a possessory offense was no longer necessary. However, the Court reaffirmed its holding in *Jones* that a person will be deemed to have standing if it can be shown that he was "legitimately on the premises" when the search occurs. *Id.*, 390 U.S. at 390, 88 S.Ct. at 974, 19 L.Ed.2d 1247.

In *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) the Supreme Court examined the "legitimately on the premises" benchmark for establishing standing under the Fourth Amendment.[4] The Court concluded that the defendant lacked standing to object to the search under the Fourth Amendment as he failed to demonstrate a legitimate expectation of privacy in the area searched. *Id.*, 439 U.S. at 149, 99 S.Ct. at 433, 58 L.Ed.2d 387. In its majority opinion the Court commented that the "legitimately on the premises" standard established in *Jones*, *supra*, "creates too broad a gauge for measurement of Fourth Amendment rights."

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which resulted in the seizure of incriminating evidence. At the time of the search neither the defendant or his codefendant's were present in the residence.

[4] The facts in *Rakas* involved the search of an automobile. During the search incriminating evidence was found in the glove compartment and under the passenger seat. The defendant was a passenger in the vehicle and sought to challenge the search under the Fourth Amendment on the grounds that he was legitimately in the vehicle at the time of the search.

Id., 439 U.S. at 142, 99 S.Ct. at 429, 58 L.Ed.2d 387. In its opinion the Court noted that the "legitimate expectation of privacy in the invaded place" standard was a more appropriate benchmark in determining standing under the Fourth Amendment and consistent with previously established principles of the Court. *Rakas*, *supra*, 439 U.S. at 143, 99 S.Ct. at 430, 58 L.Ed.2d 387, citing *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), *United States v. White*, 410 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971) and *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).[5] Therefore, the Court minimized its holding in *Jones* to the "unremarkable fact" that a person may have a "sufficient interest" in another's residence which could warrant protection under the Fourth Amendment.[6] *Rakas*, 439 U.S. at 143, 99 S.Ct. at 430, 58 L.Ed.2d 387, citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

In *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed. 85 (1990), the United States Supreme Court specifically

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[5] In response to the dissent's assertion that an abandonment of the *Jones* "legitimately on the premises" analysis would lead to a confusing and inconsistent application of the Fourth Amendment, the majority questioned whether a "bright line" existed under the former standard. As an example the majority asked whether under the legitimately on the premises test a casual visitor would also have an expectation of privacy over all rooms in the house or in an attached garage. The majority went on to cite numerous lower court decisions applying the legitimately on the premises standard resulting in inconsistent conclusions. *Rakas*, 439 U.S. at 142 n.13, 99 S.Ct. at 429-430, 58 L.Ed.2d 387.

[6] The majority opinion noted that *Jones* was the only occupant of the apartment at the time of the search, the owner of the apartment was a friend of Jones who had given him permission to use the apartment and a key to it, that Jones had personal clothing in the residence, that he had slept there "maybe a night" and had exclusive dominion and control over the residence. *Rakas*, 439 U.S. at 149, 99 S.Ct. at 433, 58 L.Ed.2d 387.

examined the ability of overnight guests and invitees to assert the Fourth Amendment in objecting to a search of a third party's premises when the overnight guest or invitee is present at the time of the search. Olson who was a suspect in an robbery/homicide was arrested in his girlfriends apartment had challenged the officer's ability to make a warrantless entry into the residence to effectuate the arrest. Although the defendant did not have a key to the premises nor any possessory or proprietary rights in the apartment, the Court determined that as an "overnight guest" of his girlfriend, the defendant had standing to assert the Fourth Amendment. In doing so the Court reasoned:

> To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a long-standing social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

Id., 495 U.S. at 98, 110 S.Ct. at 1689, 109 L.Ed.2d 85.[7]

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[7] In response to the State's argument that Olson differed from the defendant in *Jones* as he could not control access to the residence, the

In attempting to apply the reasoning of *Jones*, *Rakas* and *Olson* relating to non-overnight guests and invitees, lower courts have taken into consideration a myriad of factors including: whether the defendant was present at the time of the search, how long had the defendant been at the residence prior to the search, why the defendant was present, who the defendant was visiting, for what purposes had the defendant visited the residence in the past, did the defendant have personal effects in the residence, whether the defendant was provided with unrestricted access to the premises, whether the defendant was a casual or regular visitor, whether the defendant had control of who could be admitted or excluded from the residence, and whether others without possessory or proprietary interests in the premises were present at the time of the search. See, 5 Wayne R. LaFave, *Search and Seizure*, §11.3(b), n.71 at 134-135 (3d ed. 1996).

It is the State's position in the instant case that the Minnesota Supreme Court has chosen to ignore United States Supreme Court precedent which places the burden upon the defendant to present sufficient evidence which under the totality of the circumstances society would recognize a legitimate or reasonable expectation of privacy over the area searched. In the instant case the Trial Court made the specific factual finding:

> No evidence was presented at the hearing that the defendant had lived at this apartment long term, was an overnight guest or was related to the leaseholder. The only evidence presented showed that the defendant was a resident of Chicago, Illinois

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Court rejected the ability to admit or exclude others as a sole determining factor in establishing standing under the Fourth Amendment. *Olson*, 495 U.S. at 99-100, 110 S.Ct. at 1689, 109 L.Ed.2d 85.

> and had been present at the apartment for a period of a few hours on May 15, 1994, during the police observations.

(*Memorandum in Support of Order Pursuant to Omnibus Hearing*, App., *infra*, p. E-8) One panel on the Minnesota Court of Appeals in affirming the factual finding of the trial court concluded:

> Carter's claim that he was predominately a social guest is inconsistent with the only evidence that he used it for a business purpose--to package drugs.

State v. Carter, 545 N.W.2d 695, 698 (Minn. Ct. App. 1996)(App., *infra*, p. C-6)[8] Even the Minnesota Supreme Court acknowledged:

> . . . it is undisputed that Carter failed to produce any evidence that he was a "guest" of Thompson's, let alone an overnight guest.

State v. Carter, 569 N.W.2d 169, 174-175 (Minn. 1997) (App., *infra*, p.p. A-14 – A-15). Yet the Minnesota Supreme Court uses the United States Supreme Court opinion in *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 to uphold the defendants standing to object as his "subjective expectation" of privacy in the co-defendant's apartment is the type of expectation society is prepared to

[8] The Minnesota Court of Appeals in *Johns* deferred reaching a decision on the standing issue and affirmed the trial court on other grounds.

recognize as reasonable. *State v. Carter*, 569 N.W.2d 169, 175 (Minn. 1997)(App. *infra*, p. A-16).

The Fourth Amendment does not protect merely subjective expectations of privacy, but only those society is prepared to recognize as reasonable. *Oliver v. United States*, 466 U.S. 170, 177, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984). The failure of Minnesota's highest court to correctly apply the second prong of the United States Supreme Court's analysis of standing (i.e. is the subjective expectation of privacy one in which society will accept as reasonable) has led it to the baffling conclusion that society recognizes a persons right to engage in criminal activity in a residence provided they do so in concert with one who has a proprietary or possessor interest in the residence.

It would be a rare occasion in which a guest would be in a residence with the host and not engaged in a common act. As such, the Minnesota Supreme Court has reverted back to the "legitimately on the premises" standard specifically rejected under *Rakas* and *Olson*. To allow such a conclusion to stand as precedent would greatly expand the application of the exclusionary rule under the Fourth Amendment to the detriment of society's interests in seeking justice. Therefore the decision of the Minnesota Supreme Court must be reviewed.

II. IN CONCLUDING THAT A DEFENDANT HAS A LEGITIMATE EXPECTATION OF PRIVACY IN THE RESIDENCE OF A CO-CONSPIRATOR WHERE THE SOLE PURPOSE FOR BEING IN A RESIDENCE AT THE TIME OF THE SEARCH IS TO ENGAGE IN ILLEGAL ACTIVITIES, THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW NOT YET RULED UPON BY THE UNITED STATES SUPREME

COURT WHICH WILL CONTINUE TO FOSTER CONFLICTING DECISIONS IN OTHER STATE AND FEDERAL COURTS.

The Minnesota Supreme Court has determined that one who is lawfully in a residence for the sole purpose of engaging in illegal activities with one who has proprietary or possessory interest in the residence has standing to object to a search and seizure under the Fourth Amendment. Therefore, Minnesota's highest court has determined that an illegal joint venture with the tenant at the time of the search is and of itself sufficient to confer standing under the Fourth Amendment. Several federal courts and at least one other state supreme court have attempted to examine similar factual scenarios with conflicting results. [9] Review by the United States Supreme Court is necessary to resolve this conflict and to ensure that the Fourth Amendment is applied uniformly across the nation.

A. Federal And State Courts Which Have Found Standing Based Upon Defendant's Illegal Joint Venture With One Who Has Proprietary or Possessor Rights In The Area Searched.

In a recent decision, the Second Circuit Court of Appeals held a defendants presence at the time of the search and illegal joint venture with one who is in lawful possession of a premises creates a legitimate expectation of privacy under the Fourth Amendment. In *United States v. Fields*, 113 F.3d 313 (2nd Cir. 1997) after receiving a tip regarding illegal drug

[9] See, *United States v. Gerena*, 662 F.Supp. 1218, 1246-1247 (D.Conn. 1987) for a detailed examination of cases prior to 1987 in which federal and state courts have considered, with conflicting results, whether an illegal joint venture in and of itself is sufficient to create a legitimate expectation of privacy over an area controlled by participants in the illegal joint venture.

trafficking, officers approached a ground level apartment and officers looked into a window. Upon doing so Officers observed the defendant "bagging" crack cocaine. When officers entered the rear yard of the apartment building a man standing on the back porch yelled "5-0" which is a slang term for police. Officers believing they had been discovered made a warrantless entry into the residence to prevent the destruction of the cocaine and other evidentiary items. The defendant was subsequently arrested inside the residence. The Court of Appeals found that the defendant had a legitimate expectation of privacy under the Fourth Amendment despite defendant's illegal activity and that the defendant did not sleep or reside at the residence. The Court concluded the defendant had standing as he had a "significant connection to the residence as evidenced by the facts that he had a key to the residence, had paid the tenant $125 a month for use of the apartment to "cook and cut crack cocaine", had used the apartment for this purpose approximately 40 to 50 times and could admit "guests" with minor restrictions. *Id.* at 320-321. The Court went on the conclude that the defendant's "guest" who was present to assist in the illegal drug activity also had standing based solely upon the facts that he had been invited into the residence by the defendant and had been their for several hours. *Id.* at 321.[10]

The Ninth Circuit Court of Appeals has consistently held that a defendant who is present at the time of the search and enters into an illegal joint venture utilizing the area searched may challenge a search of the area under the Fourth

[10] The 2nd Circuit Court of Appeals consideration of illegal joint ventures as a basis to confer standing under the Fourth Amendment would appear contrary to its previous decision in *United States v. Pinto-Mejia*, 720 F.2d 248 (2nd Cir. 1983)(crew members of a fishing boat smuggling marijuana had no legitimate expectation of privacy over the boat's cargo hold or marijuana therein.

Amendment irrespective of the legality of the arrangement. In *United States v. Pollock*, 726 F.2d 1456 (9th Cir. 1984) law enforcement officers executed a search warrant on an operational methamphetamine laboratory seizing chemicals, glassware, documents evidencing the manufacture and distribution of drugs, several loaded weapons and silencers. The laboratory was set up in the residence of a co-defendant. When the search warrant was executed the defendant and other co-conspirators were present on the premises. The Ninth Court of Appeals determined that the defendant had standing to contest the legitimacy of the search warrant under the Fourth Amendment. The Court in reaching its conclusion noted that the defendant was legitimately on the premises, had entered into an arrangement with others indicating joint control and supervision of the premises. See also, *United States v. Quinn*, 751 F.2d 980 (9th Cir. 1984)(owner of boat who was involved in a joint venture to smuggle marijuana had standing to object to search of boat that was in possession of co-conspirators at time of search); *United States v. Johns*, 707 F.2d 1093, 1099-1100 (9th Cir. 1982), reversed on other grounds, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985)(airplane pilots who dropped off marijuana bales and then departed had standing to later search of a truck carrying the bales) and *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982)(defendants in a car who followed truck containing contraband had reasonable expectation of privacy in the truck).

At least one state court has concluded that an invitee conducting a joint venture with one who has possessory or proprietary rights has standing to object, albeit that the venture was illegal in nature. In *Commonwealth v. Govens*, 632 A.2d 1316 (Pa. Super. Ct. 1993) officers entered an apartment to arrest defendant who a few minutes earlier had sold cocaine from the apartment to an undercover officer. The Pennsylvania Court determined that despite the defendant's

status in the apartment being "unclear", because he was present at the time of the search, had been engaged in selling cocaine from the apartment and had apparent ability to exercise dominion and control over the apartment he had standing under the Fourth Amendment to object to the warrantless entry by police. *Id.* at 1319.

B. Federal and State Courts Which Have Rejected Standing Based Upon a Defendant's Illegal Joint Venture With One Who Has A Proprietary Or Possessory Interest in the Area Searched.

Contrary to the opinions above, several federal courts have rejected a defendant's claim of standing under the Fourth Amendment based solely upon the existence of an illegal joint venture with one who has a proprietary or possessory right in the area searched. In *United States v. Hicks*, 978 F.2d 722 (D.C. Cir. 1992) it was held that defendant did not have standing under the Fourth Amendment to object to the warrantless search of an apartment that he used to conduct illegal drug transactions. The Court reached this conclusion despite the fact that at the time of the search the defendant had been a "guest" of the tenant for several hours. The Court reasoned defendant ". . . was not engaged in any long standing social custom that serves functions recognized as valuable by society". *Id.* at 724 quoting *Minnesota v. Olson*, *supra*, 495 U.S. at 98, 110 S. Ct. at 1688, 109 L.Ed.2d 85. See also, *United States v. Harrison*, 103 F.3d 986 (D.C. Cir. 1997)(defendant had no standing to object to the search of a co-defendant's apartment as he was not a guest but merely used the premises to store drugs illegally).

In *United States v. Maddox*, 944 F.2d 1223 (6th Cir. 1991) the 6th Circuit Court took a similar position in holding that a drug conspiracy leader has no legitimate expectation of privacy in the residence of a third party even though the

residence was used as a crack house for the conspiracy and he was present at the time as a "party guest". *Maddox*, 944 F.2d at 1234. See also, *United States v. McNeal*, 955 F.2d 1067 (6th Cir. 1992)(defendant did not have an expectation of privacy in apartment believed to be occupied by a suspected drug dealer where only evidence presented was that he was an invitee of the tenant and had a key to the residence.)

The Eighth Circuit Court of Appeals has decided that one who is present in a residence of a co-conspirator for the purpose of distributing controlled substances does not have a reasonable expectation of privacy over the residence based solely upon his invitee status and the fact that he was engaged in an illegal joint venture with the resident. In *United States v. Wiley*, 847 F.2d 480 (8th Cir. 1988) the Court concluded that a defendant did not have a legitimate expectation of privacy in the residence of third person who was redistributing cocaine for him despite facts that defendant was present at the time of the search and had received at least one letter at the residence. See also, *United States v. Nabors,* 761 F.2d 465 (8th Cir. 1985)(defendant did not have a legitimate expectation of privacy in house of co-conspirator where drug transaction was to occur despite defendant's desire to keep transaction private)

The Eleventh Circuit Court of Appeals examined the defendant's standing to object to a warrantless search in the situation where the defendant was a party to an unlawful joint venture with one who had a proprietary or possessory interest in an area being used for drug transactions. *United States v. Garcia*, 741 F.2d 363 (11th Cir. 1984). The Court of Appeals held that a defendant did not have standing to object under the Fourth Amendment to the warrantless search of a co-conspirators apartment. The Court made such a determination despite defendant having used the residence on at least three occasions to discuss illegal drug transactions and telling an undercover officer to contact him by calling him at the residence. The Court also noted that the defendant was

present and in control of the residence at the time of the search. However, the Court reasoned that because defendant's contacts with the premises were by appointment only and that he did not store any personal belongings in the residence, his contacts were not personal enough to establish a reasonable expectation of privacy. See also, *United States v. Sarda-Villa*, 760 F.2d 1232 (11th Cir. 1985)(a captain and crew member did not have a legitimate expectation of privacy over hidden fuel tanks in a boat used to smuggle marijuana given the illegitimate use of the space)

Because lower federal and state courts have examined the issue of whether or not the existence of an unlawful joint venture with one who has proprietary or possessory interests in the area searched creates a legitimate expectation of privacy with conflicting results, review by the United States Supreme Court is necessary to resolve the issue and insure consistent application of the Fourth Amendment.

III. IN DECIDING THAT AN OFFICER'S NON-ENHANCED USE OF HIS NATURAL SENSES TO OBSERVE CRIMINAL ACTIVITY IN A RESIDENCE FROM A PUBLIC AREA OUTSIDE THE RESIDENCE MAY CONSTITUTE AN UNREASONABLE SEARCH THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW CONTRARY TO RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT.

In Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) it was decided that the use of listening devices and other artificial means to enhance one's natural senses may violate the defendant's legitimate expectation of privacy despite the interception or observation occurring in a

public place. However, the United States Supreme Court has noted: "What a person knowingly exposes to the public, even in his own home or office, is not subject of a Fourth Amendment protection." *Katz,* 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d 576. As one noted scholar has stated:

> Although it is generally true that a person has a justified expectation of privacy with respect to the interior of his place of residence, it does not follow that it is inevitably a search for a law enforcement officer to see or hear what is occurring therein. At least when the officer only employs his natural senses, the prevailing rule is that such uses of the senses made from a place where the officer has a right to be does not amount to a search in the constitutional sense.

1 Wayne R. LaFave, *Search and Seizure*, §2.3(c) at 480 (3rd ed. 1996). As a result the United States Supreme Court has consistently upheld non-enhanced observations from areas outside the curtilage of a residence when unusual measures were taken for the officer to obtain a location from which an observation can be made. *Florida v. Riley,* 488 U.S. 445, 449, 109 S.Ct. 693, 696, 102 L.Ed.2d 835 (1989)(officer's observation, with his naked eye, on interior of partially covered greenhouse in residential backyard from helicopter circling 400 feet above did not constitute a "search") and *California v. Ciraola,* 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986)(warrantless aerial observation, with naked eye, of fenced-in backyard within the curtilage of a home was not a search).

The United States Supreme Court holding that non-enhanced use of natural senses from common areas outside the

curtilage of a residence does not violate the Fourth Amendment has been repeatedly followed by lower courts as well. *United States v. Daoust*, 916 F.2d 757 (1st Cir. 1990)(police officers investigating illegal drug activity upon finding defendant's front door inaccessible walked up a 4 to 7 foot embankment at the rear of the residence. While in the back one of the officers looked through a kitchen window and observed a firearm in the residence. The officer's observations, while legitimately in the area at the time of the search, was not a search under the Fourth Amendment as officers may go to a person's home to interview him and if the front door is inaccessible, it is not unreasonable to go to the back of the house to check for a back door.); *United States v. Fields*, 113 F.3d 313 (2nd Cir. 1997)(search did not occur when officers looked into an apartment through a 5 to 6 inch opening in covered window and observed the defendants engaging in illegal drug activities. At the time the officers were standing in a fenced side yard which was a common area accessible to other tenants of the building.); *United States v. Taylor*, 90 F.3d 903 (4th Cir. 1996)(officers did not engage in a search when they looked into a residence through a dining room window and observed illegal drug activity. At the time of their observations the officers were standing a few feet from the front door of the residence normally accessible to the public,); *United States v. Jackson,* 588 F.2d 1046 (5th Cir. 1979)(federal narcotics agents investigating illegal drug activity at a motel did not conduct a search when they laid on the floor and pressed their ear to a 3/4 inch crack at the bottom of a door which connected the room to the suspects and overheard conversations regarding illegal drug activity as words were exposed to the "plain view" of others.); *United States v. Acevedo*, 627 F.2d 68 (7th Cir. 1980)(officers investigating heroin distribution situated in a "gangway" between the apartment building and a next door tavern did not conduct a search by "peering" into an apartment window to

observe a drug transaction.); *United States v. Anderson*, 552 F.2d 1296 (8th Cir. 1977)(Investigators did not conduct a search when walking to a back door of a residence. They looked in a side window and observed stolen property.); *United States v. Wheeler*, 641 F.2d 1321 (9th Cir. 1981)(Sheriff who was attempting to settle a civil dispute between two tenants of a duplex did not search when he "peered" through a one inch gap in a six foot privacy fence and climbed on top of several tires to look over a fence into the defendant's backyard as at the time of his observations the Sheriff was either standing on the adjacent tenant's property or on city property.); *State v. Taylor*, 401 N.E.2d 459 (Ohio Ct. App. 1978)(Officer standing on walkway accessible only to other tenants did not conduct a search when he looked into an apartment window to observe illegal drug activity.); *Commonwealth v. Hernley*, 263 A.2d 904 (Pa. Super. Ct. 1970)(Officer did not conduct a search under the Fourth Amendment despite standing on top of four foot ladder and using binoculars to look through a window as the ladder was located on another's property.); *State v. Clarke*, 242 So.2d 791 (Fla. Dist. Ct. App. 1970)(Officers observations into an apartment from a fire escape was not a search under the Fourth Amendment); *People v. Berutko*, 453 P.2d 721 (Cal. 1969)(Officer did not conduct a search when he looked into an apartment through a small aperture in a window covered by a curtain or drape to observe illegal drug activity); and *People v. Wright*, 242 N.E.2d 180 (Ill. 1968)(Officer standing on elevated train tracks 1 to 3 feet from apartment window did not conduct a search when he looked into the apartment through a crack in the curtains.)

In its opinion the Minnesota Supreme Court did not specifically decide whether the observations were from an area outside the apartment's curtilage. However, in its majority opinion the Court did comment: "It is at least arguable that Thielen's position just outside the apartment window was on a

common area and not the curtilage to Thompson's apartment." *State v. Carter*, 569 N.W.2d 169, 177, n. 10 (Minn. 1997)(App. *infra.*, p.A-20)[11] However, the Minnesota Supreme Court went on to add:

> The fundamental question under Katz is whether the looking intruded upon the justified expectation of privacy of the occupant. This, in turn, ordinarily requires consideration of two factors: (1) the location of the officer at the time of the viewing; and (2) the precise manner in which the view was achieved.

Id. at 177, quoting 1 Wayne R. LaFave, *Search and Seizure*, §2.3(d) at 495, 497 (2d ed. 1987). Focusing on the second prong of the above two part test the Court concluded that Officer Thielen took "extraordinary measures" when he walked off the sidewalk, across the grass, over some bushes, put his face within 12 to 18 inches of the window and looked through a small gap between the blinds. Because extraordinary measures were used the Minnesota Supreme Court determined that Officer Thielen's observations were a search under the Fourth Amendment. *Carter*, 569 N.W.2d at 178.(App. *infra.*, p. A-20).[12]

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[11] In addition to determining that the respondent's did not have an expectation of privacy in the apartment of their co-conspirator, the Trial Court also concluded that Officer's Thielen's observation into the apartment was not a search as it was made from an area outside the curtilage of the apartment in which the respondent's had no reasonable expectation of privacy. "Order Pursuant to Omnibus Hearing" (App., *infra.*, at p. E-12)

[12] Despite the near uniform finding of the federal courts that a search will not occur under the Fourth Amendment when an officer utilizes his natural senses to detect criminal activity from a public area, a few state courts have found to the contrary. *State v. Bowling*, 867 S.W.2d

Clearly the "extraordinary measures" taken by officer Thielen were minor in comparison to the actions of other officers in similar situations. Review by the United States Supreme Court is necessary to ensure that the Fourth Amendment and the opinions of the United States Supreme Court are interpreted and applied uniformly across the country.

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338 (Tenn. Crim. App. 1993)(It was a search under the Fourth Amendment when an officer standing on the driveway of a residence, laid on the ground to look under a partially opened garage door.); *State v. Jordan*, 631 P.2d 989 (Wash. Ct. App. 1981)(Officers responding to a loud party call at a duplex conducted a search when standing on the porch of the duplex they looked into the residence through a 6 inch crack between the casing of the window and a drape.); *State v. Kaaheena*, 575 P.2d 462 (Haw. 1978)(Officer standing on a crate located on a sidewalk next to a residence conducted a search under the Fourth Amendment when he looked into a window of the residence.); and *Olivera v. State*, 315 So.2d 487 (Fla. Dist. Ct. App. 1975)(police who left the sidewalk of an apartment building to an apartment window to observe and overhear conversations conducted a search under the Fourth Amendment.)

CONCLUSION

For the reasons discussed above, the State of Minnesota respectfully request that the United States Supreme Court grant the petition for writ of certiorari to review the judgment of the Minnesota Supreme Court in these cases.

Respectfully submitted,

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APPENDIX INDEX

Appendix A: Opinion and Judgment of the Minnesota Supreme Court: *State v. Carter* A-1

Appendix B: Opinion and Judgment of the Minnesota Supreme Court: *State v. Johns* B-1

Appendix C: Opinion and Judgment of the Minnesota Court of Appeals: *State v. Carter* C-1

Appendix D: Opinion and Judgment of the Minnesota Court of Appeals: *State v. Johns* D-1

Appendix E: Order Pursuant to Omnibus Hearing of the First Judicial District; *State v. Johns and State v. Carter* ... E-1

STATE of Minnesota, Respondent,

v.

Wayne Thomas CARTER, petitioner, Appellant.

No. CX-95-1368.

Supreme Court of Minnesota.

Sept. 11, 1997.

Following denial of his motion to suppress, defendant was convicted, in the District Court, Dakota County, Mary E. Pawlenty, J., of controlled substance offenses. Defendant appealed. The Court of Appeals, 545 N.W.2d 695, Davies, J., affirmed. Defendant again appealed. The Supreme Court, Tomljanovich, J., held that: (1) defendant had standing to assert unconstitutionality of search of premises not under his control; (2) officer's observations of interior of apartment constituted "search" for Fourth Amendment purposes whether or not made from apartment's curtilage; and (3) search was not reasonable.

Reversed.

Stringer, J., dissented with opinion in which Keith, C.J. and Blatz, J., joined.

1. Criminal Law 🔑 1139

Supreme Court reviews *de novo* district court's denial of motion to suppress, where facts of case are not in dispute.

2. Criminal Law 🔑 394.5(2)

Criminal defendant seeking to suppress evidence on basis that it was obtained in violation of Fourth Amendment must show that he or she is proper party to assert claim of illegality and to seek remedy of exclusion, and must demonstrate: that he or she has adversary interest in outcome; and that such adverse interest is based upon alleged violation of defendant's rights, rather than violation of rights of some third party. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures 🔑 162

For purpose of ascertaining standing to challenge constitutionality of search, defendant must show possessory interest in items seized and expectation of privacy in areas searched. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures 🔑 164

For purpose of ascertaining standing to challenge constitutionality of search. defendant against whom allegedly illegally obtained evidence is being offered qualifies as one who has adversary interest. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures 🔑 162

Question of whether defendant challenging constitutionality of search is alleging adverse interest based upon his or her own rights or those of third party turns on determination of whether disputed search infringed interest of defendant which Fourth Amendment was designed to protect; such interest exists where person who claims constitutional protection has legitimate expectation of privacy in invaded place. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures 🔑 162

For purpose of ascertaining standing to challenge constitutionality of search, defendant has "legitimate

expectation of privacy" in premises searched, as required to establish violation of his individual Fourth Amendment right, where his subjective expectation of privacy is one that society is prepared to recognize as reasonable; defendant must show both subjective expectation of privacy and that, under totality of circumstances, this expectation was reasonable in light of longstanding social customs that serve functions recognized as valuable by society. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

7. Searches and Seizures 🔑 164

Defendant observed by police, through gap in closed blinds of acquaintance's apartment, preparing cocaine for distribution, had standing to assert unconstitutionality of search; defendant's subjective expectation of privacy was evidenced by fact that he was observed inside apartment of acquaintance with doors shut and blinds drawn, and defendant was type of person who possessed legitimate expectation of privacy in apartment. U.S.C.A. Const.Amend. 4.

8. Searches and Seizures 🔑 162

For purpose of ascertaining standing to challenge constitutionality of search, legitimacy of defendant's expectation of privacy in prentises not under his control does not depend upon defendant's status as "guest" in any formal sense, but rather upon whether status actually enjoyed by defendant is type of longstanding social custom that serves functions recognized as valuable by society. U.S.C.A. Const.Amend. 4.

9. Searches and Seizures 🔑 164

Defendant had leaseholder's permission to be in apartment, worked in concert with leaseholder on common task of dividing and packaging cocaine, and remained in

apartment for at least two and a half hours had standing to challenge constitutionality of search. U.S.C.A. Const.Amend. 4; M.S.A. Const. Art. 1, § 10.

10. Searches and Seizures 🔑 162

For purpose of ascertaining whether particular defendant's possesses legitimate expectation of privacy in searched premises not under his control, society recognizes as valuable right of property owners or leaseholders to invite persons into privacy of their homes to conduct common task, be it legal or illegal activity. U.S.C.A. Const.Amend. 4.

11. Searches and Seizures 🔑 13.1

For constitutional purposes, "search" occurs whenever government agents intrude upon area in which person has reasonable expectation of privacy. U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

12. Searches and Seizures 🔑 17

Fact that police officer was arguably standing outside curtilage of multiple-unit dwelling at time he observed illegal activity occurring inside apartment was insufficient, without more, to establish that his observations were not "search" for Fourth Amendment purposes; focus of curtilage test was area observed rather than area in which officer was standing, and fact that officer was outside curtilage did not eliminate occupant's expectation of privacy within interior of apartment. U.S.C.A. Const.Amend. 4.

13. Searches and Seizures 🔑 17

Not all instances in which police officer looks into interior of house or apartment constitute "search" under Fourth Amendment; fundamental question is whether looking

intruded upon justified expectation of privacy of occupant, which in turn ordinarily requires consideration of location of officer at time of viewing and precise manner in which view was achieved. U.S.C.A. Const.Amend. 4.

14. Searches and Seizures 🔑 26

That which person knowingly exposes to public, even in his own home or office, is not subject to Fourth Amendment protection; Fourth Amendment does not protect activities easily observable by general public. U.S.C.A. Const.Amend. 4.

15. Searches and Seizures 🔑 17

For purpose of determining whether police officer's observations of interior of apartment constituted "search" for Fourth Amendment purposes, apartment leaseholder and others present in apartment did not knowingly expose their activities to public, where apartment blinds were drawn and officer had to take extraordinary measures to be able to observe activities within from outside. U.S.C.A. Const.Amend. 4.

16. Searches and Seizures 🔑 17

Police officer's observations of interior of apartment constituted "search" for Fourth Amendment purposes, whether or not officer was outside building's curtilage at time he made them; apartment leaseholder and others present in apartment did not knowingly expose their activities to public, and officer had to leave sidewalk, walk across grass, climb over bushes, crouch down and place his face 12 to 18 inches from the window to observe activities within. U.S.C.A. Const. Amend. 4.

17. Searches and Seizures 24, 40.1

For search to be reasonable under Fourth Amendment, police must have both probable cause and search warrant. U.S.C.A. Const.Amend. 4.

18. Arrest 63.4(1)
Searches and Seizures 44

Police may constitutionally make warrantless arrests, entries and searches of dwellings if they can demonstrate existence of probable cause and exigent circumstances. U.S.C.A. Const.Amend. 4.

19. Searches and Seizures 23

Conduct that would constitute illegal search does not become something less merely because police had reasonable suspicion and embarked on a search of limited intrusiveness; fact that officer reasonably expected to find evidence and used least intrusive means possible to achieve that end is insufficient to sustain warrantless search. U.S.C.A. Const.Amend. 4.

20. Drugs and Narcotics 185(2)

Search consisting of police officer's observations through blinds covering window of apartment was not "reasonable search" within meaning of Fourth Amendment, despite contention that officer had reasonable basis for believing occupants of apartment were engaged in drug activity and that search was minimally intrusive, where officer lacked either probable cause to obtain search warrant or warrant itself. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

Syllabus by the Court

1. A person who had permission from the leaseholder to be in an apartment, collaborated with the leaseholder on a common task while in the apartment, and remained in the apartment for 2 1/2 hours, had standing to challenge the legality of a search of that apartment under the Fourth Amendment to the United States Constitution, and Article I, Section 10 of the Minnesota Constitution.

2. It was a search when a police officer stepped off the sidewalk, walked across the grass, climbed behind some bushes, and looked into a ground floor apartment by peering through a gap in the closed window blinds from a distance of 12 to 18 inches.

3. Because the officer had neither probable cause nor a warrant, his search of the apartment was unreasonable.

Scott Swanson, Assistant State Public Defender, Minneapolis, for Appellant.

Hubert H. Humphrey III, Attorney General, St. Paul, James C. Backstrom, Dakota County Attorney by Phillip D. Prokopowicz, Assistant Dakota County Attorney, Hastings, for Respondent.

Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

By looking through the gaps in the closed blinds covering a window, a police officer observed the appellant, Wayne Thomas Carter, as he engaged in a drug-packaging operation with two other persons, one of whom was the leaseholder of the apartment. The district court held that Carter, who was an

out-of-state visitor, did not present any evidence to establish his standing to contest the legality of the observation. The court also concluded that the officer did not conduct a search because he made the observations from an area where Carter did not have a reasonable expectation of privacy. The court of appeals affirmed the district court, but based its holding only on the finding that Carter did not have standing to bring a motion to suppress any evidence obtained from the officer's observations. We reverse, and hold that the evidence was sufficient to establish that Carter had standing to challenge the legality of the observation. We further hold that the officer's observation rose to the level of a search, and that the officer's lack of probable cause and a warrant rendered the search unreasonable under the Fourth Amendment of the United States Constitution, and Article I, Section 10 of the Minnesota Constitution.

At approximately 8 p.m. on the evening of May 15, 1994, an anonymous informant approached Eagan police officer Jim Thielen. The informant, whom Thielen never had seen before, told Thielen that he/she[1] had walked by apartment 103 at 3943 South Valley View Drive and observed people sitting around a table inside the apartment "bagging" a white powder. The informant also told Thielen that he/she believed the occupants of the apartment had used a blue four-door Cadillac located in the parking lot adjacent to the apartment complex. The informant also told Thielen that the car had an Illinois license plate that read SGD 896. In response to this information, Thielen went to the complex and approached the ground floor window of apartment 103. Thielen then walked toward the window of the apartment by leaving the common sidewalk that led to the apartment building's entrance and stepping on a

[1] Thielen testified at the omnibus hearing that he spoke with the confidential informant for 15 to 25 minutes. He gave no further detail, however, about what their conversation involved, stating that to do so would reveal the informant's identity.

grassy common area closer to the window. Thielen then walked behind some short bushes located in front of the apartment window and stood approximately 12 to 18 inches from the window. The windows blinds were drawn closed, but gaps in the blinds allowed Thielen to observe activity in the apartment. While looking through the gaps in the blinds, Thielen observed two males and one female sitting at a kitchen table. One of the males appeared to be placing a white powdery substance onto the kitchen table. This person then would pass the white substance to the second male who then would place the powder into a plastic bag. The second male, who was wearing bedroom slippers, would in turn give the plastic bag to the female who would cut off the ends of the bag and place it on the table.

After observing this activity for approximately 15 minutes, Thielen left the apartment complex and went to a nearby fire station where he had another conversation with the informant and another Eagan police officer. At this time the informant told the officers that the people inside the apartment might be in possession of a gun. Thielen then returned to the apartment complex where he located a Cadillac matching the description given by the informant. He then returned to the fire station, telephoned Officer Kevin Kallestad of the South Metro Drug Task Force, and reported what he had seen. Kallestad instructed Thielen to stop and secure the suspect vehicle should anyone attempt to drive it away. Police also began to prepare affidavits as part of a request for warrants to search both the apartment and the Cadillac.

At approximately 10:30 p.m., an Eagan police officer observed two males putting items into the suspect Cadillac. The two males then entered the vehicle and started to drive it out of the parking lot. As per instructions, Eagan police stopped the vehicle at the intersection of Rahn Road and Beau de Rue Drive. The police found Carter in the driver's seat and Melvin Johns in the passenger's seat. The police ordered both

men out of the car. As the police opened the door to let Johns out of the car, they observed a black zippered pouch and a handgun, later determined to be loaded, on the floor of the vehicle. The police then placed Carter and Johns under arrest. The police subsequently towed the Cadillac to the Eagan Police Department, and after receiving the signed search warrant at approximately 1:30 a.m. on May 16, the police searched the vehicle. When the officers opened the black zippered pouch, they discovered a white mixture in plastic baggies, Johns' identification, pagers, and a scale. Tests later determined that the white mixture was 47.1 grams of cocaine.

Late in the evening of May 15, after the arrests of Carter and Johns, Eagan police returned to apartment 103 and arrested its occupant, Kimberly Thompson.[2] At approximately 3 a.m. on May 16, police executed a search warrant on the apartment and located cocaine residue on the kitchen table and plastic baggies consistent with those found in the automobile driven by Carter. Thielen subsequently identified Carter, Johns and Thompson as the individuals he had observed in the apartment packaging the white mixture. He identified Carter as the individual he had seen putting the white mixture on the table and dividing it into piles, Johns as the man who wore slippers and placed the piles into baggies, and Thompson as the individual who cut the ends off the baggies and placed the baggies in piles. Police ultimately learned that Carter and Johns were residents of Chicago, Illinois, and that Thompson was the sole lessee of apartment 103. Subsequent to his arrest, Carter made a statement to the police in which he admitted ownership of a duffel bag found inside the Cadillac. A search of the duffel bag uncovered a digital gram scale containing traces and residue of cocaine. Johns made a statement to the police admitting he had accepted a proposal

[2] Thompson was a co-defendant in the omnibus hearing. She subsequently pled guilty and is not a party to this appeal.

to transport cocaine from Illinois to Minnesota for money, and that he, Carter and Thompson had packaged the cocaine at Thompson's apartment. He also admitted that there were approximately two ounces of crack cocaine and a handgun in the vehicle.

Carter, Johns and Thompson made motions through joint counsel to suppress their statements and all evidence seized from both the apartment and the Cadillac. They argued, among other things, that Thielen's initial observation through the window of Thompson's apartment was an unreasonable search under the Fourth Amendment and that all evidence obtained as a result of those observations should be excluded as fruit of the poisonous tree. After a two-day omnibus hearing, the district court denied the motions to suppress of Carter and Johns. The court held that the two defendants did not have standing to challenge Thielen's observations through Thompson's window because both defendants failed to present evidence that their expectations of privacy in the apartment were based upon "understandings that are recognized and permitted by society." *See Rakas v. Illinois,* 439 U.S. 128,143-44 n. 12, 99 S.Ct. 421, 430 n. 12, 58 L.Ed.2d 387 (1978); *see also Minnesota v. Olson,* 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). In particular, the court noted that the only evidence presented by the defense showed that the two defendants were out-of-state residents who had been at the apartment for a period of time on May 15, 1994. The district court also concluded that Thielen's observation was not a search within the meaning of the Fourth Amendment because the officer made his observation from an area in which the defendants had no reasonable expectation of privacy.

Following the district court's denial of their motions to suppress, Carter and Johns proceeded with separate counsel. The district court tried Carter on stipulated facts and found him guilty of conspiracy to commit a controlled-substance crime in the first degree and aiding and abetting a controlled-

substance crime in the first degree. Minn. Stat. § 152.021, subd. 1(1), subd. 3(a) (1996); Minn. Stat. § 609.05 (1996). The district court denied Carter's request for a downward departure and sentenced him to 86 months. Carter appealed his conviction, challenging the legality of Thielen's observations through Thompson's apartment window. The court of appeals held that Carter did not have standing to object to Thielen's actions because Carter's claim that he was predominantly a social guest was "inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose–to package drugs." *State v. Carter*, 545 N.W2d 695, 698 (Minn.App.1996).

We therefore begin our analysis by addressing the question of standing, and only if we determine that Carter had standing to bring a motion to suppress evidence recovered as a result of Thielen's observation of the apartment, will we address the legality of Thielen's actions–whether his observation qualified as a search, and if it did, whether it was reasonable.

I. Standing

[1-5] Because the facts of this case are not in dispute, we will review de novo the district court's denial of Carter's motion to suppress. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn.1992). Before a criminal defendant can bring a motion to suppress evidence on the basis that it was obtained in violation of the Fourth Amendment, the defendant must show that he or she is a proper party to assert the claim of illegality and to seek the remedy of exclusion. To establish such a showing, a party must demonstrate two things: First, that he or she has an adversary interest in the outcome. *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 702, 7 L.Ed.2d 663 (1962). And second, that the adverse interest is based upon an alleged violation of the rights of the individual, rather than the

violation of the rights of some third party. *Jones v. United States*; 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697 (1960)(overruled on other grounds).[3] As far as the first factor is concerned, a criminal defendant against whom the allegedly illegally obtained evidence is being offered surely qualifies as one who has an adversary interest. *See* 5 Wayne R. LaFave, *Search and Seizure* § 11.3, at 117 (3d ed.1996) (hereinafter LaFave). Consequently we hold that Carter had an adversarial interest in the outcome. The analysis of the second factor is not so easily decided, however. As the United States Supreme Court has told us, the question turns on a "determination of whether the disputed search * * * has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas*, 439 U.S. at 140, 99 S.Ct. at 429. Such an interest exists when "the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Id.* at 143, 99 S.Ct. at 430. The question before us, therefore, is whether Carter had a legitimate expectation of privacy in Thompson's apartment.[4]

[6] A defendant has a legitimate expectation of privacy when his or her subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" *Id.* at 143-44 n. 12, 99 S.Ct. at 430 n. 12 (quoting *Katz v. United States*,

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[3] *Jones* was being interpreted as establishing "automatic standing" to challenge the legality of a search for any persons charged with crimes of possession. *United States v. Salvucci*, 448 U.S. 83, 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980). *Salvucci* overruled this holding to establish that the defendant must show a possessory interest in the items seized and an expectation of privacy in the areas searched to establish that he/she had standing to challenge the legality of a search. *Id.*

[4] The district court found that Carter had no expectation of the privacy in the area from which Thielen observed the illegal activity. As we will discuss *infra* in Section II, however, the proper question is whether Carter had an expectation of privacy in the area into which Thielen was looking–namely the inside of the apartment.

389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967)(Harlan, J., concurring)). In other words, a criminal defendant must make two showings to establish that he or she based the motion to suppress upon an alleged violation of his or her individual Fourth Amendment right. First, he or she must show a subjective expectation of privacy, and second, he or she must show that this expectation was reasonable in light of "longstanding social customs that serve functions recognized as valuable by society." *Olson*, 495 U.S. at 98, 110 S.Ct. at 1689.

[7] In the case at bar, it is clear that Carter had a subjective expectation of privacy. He was inside the apartment of an acquaintance with the doors shut and the blinds drawn. The more difficult question is whether Carter's expectation was legitimate, that is, whether the expectation was the type that society is prepared to recognize as reasonable. Both the district court and court of appeals concluded that Carter failed to establish that his subjective expectation was legitimate. The district court based its conclusion on the fact that Carter offered no evidence that his status in relation to the apartment was similar to the status of the defendant in Olson, or that his status was such that it provided a legitimate expectation of privacy in the apartment. Likewise, the court of appeals based its conclusion on the fact that Carter's claim that he was a social guest was inconsistent with the "only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose * * * ." *Carter*, 545 N.W.2d at 698. In both cases, the courts focused on the facts of *Olson*, a case in which there was no dispute that the criminal defendant was an overnight guest of the person who had the possessory interest of the searched residence.[5] By comparison, it is

[5] The issue of whether a defendant has standing to assert a violation of the Fourth Amendment has a long and muddled history. Throughout the first half of this century, courts decided standing by using common-law concepts of private property. Courts generally found those

undisputed that Carter failed to produce any evidence that he was a "guest" of Thompson's, let alone an "overnight guest." But a closer reading of *Olson* reveals that the Supreme Court does not require a person to establish his or her status as either a guest or overnight guest before that person can prove a legitimate expectation of privacy in a location that is searched. Instead, the person must establish only that under the totality of the circumstances, the person's subjective expectation was the type of expectation that "society is prepared to recognize as 'reasonable.'"

[8] Admittedly, such a test is a difficult, one to define, let alone apply. But the Supreme Court's own words offer guidance. "To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society." *Olson*, 495 U.S. at 98, 110 S.Ct. at 1689. In other words, the Court in *Olson* did not recognize the expectation of privacy as legitimate merely because the criminal defendant was a *guest*. *See* 5 LaFave, *supra*, § 11.3(b), at 137 (stating that the Court's decision lends "considerable support to the claim that shorter

individuals who had an ownership interest, a leasehold, or "dominion and control" over the searched property to have standing to contest a search of the property. Courts, meanwhile, found that mere "guests" and "invitees" did not have such standing. *Jones*, 362 U.S. at 265-66, 80 S.Ct. at 733 (citations omitted). The Supreme Court rejected this property-based approach in favor of a broad rule that allowed "anyone legitimately on the premises where a search occurs" to challenge its legality by way of a motion to suppress. *Id.* at 267, 80 S.Ct. at 734. The Court later retreated from the "legitimately on the premises" test. *Rakas*, 439 U.S. at 128, 99 S.Ct. at 423. The Court in *Rakas* held that the mere fact that an individual was "legitimately on the premises" was insufficient to give that person standing to contest a search of another's dwelling place. *Id.* at 143, 99 S.Ct. at 430.

term guests also have standing").[6] Rather, it recognized the defendant's expectation of privacy as legitimate because the criminal defendant's status as a guest was the type of longstanding social custom that serves functions recognized as valuable by society. As the Court went on to state: "The point is that hosts will more likely than not respect the privacy interest of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." *Olson*, 495 U.S. at 99, 110 S.Ct. at 1689. Consequently, if Carter had established that his status is the type that serves functions recognized as valuable by society, his expectation of privacy would have been legitimate.

[9, 10] The stipulated facts show that the apartment's leaseholder allowed Carter and Johns into her apartment for the purpose of packaging cocaine in exchange for one-eighth ounce of cocaine; that Thielen observed all three persons inside the apartment as they collaborated to divide and package the cocaine; that Carter and Johns remained inside the

[6] Many other courts have concluded that *Olson* does not require a criminal defendant to prove his or her status as a guest to establish a legitimate expectation of privacy. *See, e.g., Hill v. United States*, 664 A.2d 347, 352 (D.C. 1995) ("To be sure, being an overnight guest is not the sole means by which one may claim an expectation of privacy in another's home.") (citations omitted); *Davis v. State*, 582 So.2d 61, 61 (Fla.Dist.Ct.App. 1991) ("*Olson* does not necessarily deny standing to one whose status in a residence is less than that of an overnight guest."); *State v. Wright*, 119 N.M. 559, 893 P.2d 455, 459 (N.M.Ct.App.1995) ("[W]e do not read *Olson* to make an individual's overnight status as a houseguest a precondition to the right to assert an invasion of a reasonable expectation of privacy under the Fourth Amendment to the United States Constitution."); *State v. Ackerman*, 499 N.W.2d 882, 884 (N.D.1993) ("[M]uch of the reasoning underlying the Supreme Court's finding of standing on the part of an overnight guest would support standing on the part of other guests, as well * * * .").

apartment for at least 2 1/2 hours, and that Johns was wearing bedroom slippers while inside the apartment.[7] Although we recognize that these facts probably fail to establish Carter as a "guest" of the apartment's leaseholder, we conclude that they were sufficient to prove that Carter was the type of person who possessed a legitimate expectation of privacy in the apartment. After all, Carter had the leaseholder's permission to be inside the apartment.[8] He remained inside the apartment for at least 2 1/2 hours, during which time he worked in concert with the leaseholder on a common task.[9] Whether

[7] Carter offered evidence of Johns' slippers to show that the two were so comfortable inside the apartment that they must have been guests. While recognizing the relevance of such a fact, we refuse to place a great deal of constitutional significance on a person's footwear. It is interesting to note, however, that another court recently found a lack of standing in part on the fact that one of the defendants "was feigning sleep while fully dressed and wearing *shoes*." *Hill v. United States*, 664 A.2d 347, 350 (D.C. 1995) (emphasis added).

[8] Although the fact that a person is legitimately on the premises is not by itself sufficient to establish standing, *Rakas*, 439 U.S. at 142, 99 S.Ct. at 429, it is important to note that a person who is not legitimately on the premises cannot have standing, 5 LaFave, *supra*, § 11.3(b), at 143. Courts also have concluded that "a showing that a person authorized to do so gave permission for the defendant to be present on that particular occasion" was sufficient to establish the fact that the defendant was legitimately on the premises. *Id.* at 144, 99 S.Ct. at 431

[9] Many courts have denied standing where it is apparent that the party alleging the illegal search was on the property very briefly or had only a minimal connection to the property or the host. *See, e.g., United States v. McNeal*, 955 F.2d 1067 (6th Cir.1992) (finding no legitimate expectation of privacy where defendant stated he had stopped by the host's home only to use the telephone); *Prophet v. United States*, 602 A.2d 1087 (D.C. 1992) (finding no standing where defendant had been at his friend's house for only 3 or 4 minutes prior to the police's entry); *Davis v. State*, 582 So.2d 61 (Fla.Dist.Ct.App.1991) (finding no legitimate expectation of privacy where defendant had been given permission to enter house by occupant's boyfriend, but occupant never had seen the defendant before and was shocked to find him in her

these facts establish Carter as a visitor, invitee or business partner does not matter. As the Court has carefully noted, arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like do not control. *Jones*, 362 U.S. At 266, 80 S.Ct. at 734. What does control, however, is the nature of the relationship between the property possessor and the person alleging the privacy interest in the property. If the relationship is the type that society recognizes as valuable, then we will find standing. If it is not, then we will not. Although society does not recognize as valuable the task of bagging cocaine, we conclude that society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity. We, therefore, hold that Carter had standing to bring his motion to suppress the evidence gathered as a result of Thielen's observations.

II. The Search

[11, 12] Having determined that Carter had standing to assert a violation of the Fourth Amendment, we now turn to the question of whether Thielen's observation constituted a search. A search occurs whenever government agents intrude upon an area where a person has a reasonable expectation of privacy. *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986) (citing *Katz*, 389 U.S. at 360, 88 S.Ct. at 516 (Harlan, J. concurring)). The state argues Thielen's observations did not rise to the level of a search because he was not inside the leaseholder's "curtilage"

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apartment); *State v. Wise*, 879 S.W.2d 494 (Mo. 1994) (finding no legitimate expectation of privacy where defendant merely had entered occupant's apartment to make a phone call); *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993) (finding no standing where defendant had entered neighbor's house only to use the bathroom).

when he made his observation. As support for its argument, the state offers *State v. Krech*, 403 N.W.2d 634 (Minn.1987) for the proposition that the common grounds of multi-unit apartment complexes are not entitled to Fourth Amendment protection. In *Krech*, we stated:

> "it is a fair generalization that the lands adjoining a multiple-occupancy residence are less likely to receive Fourth Amendment protection than the yard of a single family residence" because "the privacy expectation as to such an area is often diminished because it is not subject to the exclusive control of one tenant and is utilized by tenants generally and the numerous visitors attracted to a multiple occupancy building."

403 N.W.2d at 637 (quoting 1 Wayne R. LaFave, *Search and Seizure* § 2.3(f), at 414 (2d ed.1987)). The state's argument misses the point of *Krech*, however.

[13] In developing the concept of "curtilage," the Supreme Court actually extended Fourth Amendment protection to those areas so intimately tied to the home itself that an individual reasonably could have expected persons to treat those areas as part of the home. *United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134, 1139, 94 L.Ed.2d 326 (1987). The curtilage cases, therefore, necessarily involve factual scenarios in which police search areas spatially removed from the home itself. *See, e.g., Dunn*, 480 U.S. at 297, 107 S.Ct. at 1137 (agents entered area surrounding barns, 50 feet from house); *Krech*, 403 N.W.2d at 637-38 (police entered yard of duplex where garbage cans were kept). The key question in a curtilage case is not where the police officer was standing when he made his observation, although police officers must establish that they had a legal right to be where they were at the time of the observation, rather it is the area that was observed. Although it is plausible that Thielen's

presence just outside the apartment window was legitimate,[10] the state cannot rely on Thielen's position alone to justify his subsequent observation into the apartment. The fact that a police officer was situated outside a residence's curtilage does not necessarily eliminate the occupant's expectation of privacy within the interior of the dwelling. 1 LaFave, *supra*, § 2.3(d), at 495-96.

> The fundamental question under *Katz is* whether the looking intruded upon the justified expectation of privacy of the occupant. This, in turn, ordinarily requires consideration of two factors: (1) the location of the officer at the time of the viewing; and (2) the precise manner in which the view was achieved.

Id at 497.

[14] This, of course, does not mean that all instances in which a police officer looks into a house or apartment will be a search under the Fourth Amendment. "What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection." *Katz*, 389 U.S. at 351, 88 S.Ct. at 511. We, therefore, have held that police did not violate a homeowner's expectation of privacy by walking onto the homeowner's driveway and observing stolen property that was in plain sight from the driveway. *State v. Crea,* 305 Minn. 342, 346, 233 N.W.2d 736, 739 (1975). Other courts similarly have found no Fourth Amendment protection for activities that are easily observable by the general public.[11]

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[10] It is at least arguable that Thielen's position just outside the apartment window was on a common area and not the curtilage to Thompson's apartment.

[11] *See United States v. Acevedo,* 627 F.2d 68 (7th Cir.1980) (finding no search where police officer looked into an apartment window from a public gangway); *People v. Berutko,* 71 Cal.2d 84, 77 Cal.Rptr. 217, 453 P.2d 721 (1969) (finding no search where officers on defendant's front porch were able to see illegal activity through an

[15,16] People who close their doors and window blinds, however, do not knowingly expose their activities to the public. Consequently, we conclude that Carter, Johns, and Thompson took sufficient precautions to keep their activities private. It was only after Thielen left the sidewalk, walked across the grass, climbed over some bushes, crouched down and placed his face 12 to 18 inches from the window that their activities became observable. As one noted commentator has stated:

> [W]hen police surveillance takes place at a position which cannot be called a "public vantage point," i.e., when the police–though not trespassing on the defendant's curtilage–resort to the extraordinary step of positioning themselves where neither neighbors nor the general public would be expected to be, the observation or overhearing of what is occurring within a dwelling constitutes a Fourth Amendment search. This is really what *Katz* is all about.

1 LaFave, *supra*, § 2.3(d), at 482. Several courts have agreed that it is a search whenever police take extraordinary measures to enable themselves to view the inside of a private structure.[12]

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opening in window covering); *People v. Wright,* 41 Ill.2d 170, 242 N.E.2d 180 (1968) (finding no search where officer standing on transit authority right-of-way was able to see through a crack in the window curtain into defendant's apartment); *State v. Taylor,* 61 Ohio App.2d 209, 401 N.E.2d 459 (1978) (finding no search where officers looked into unshaded apartment window from public sidewalk).

[12] *See, e.g., Lorenzana v. Superior Court of Los Angeles County,* 9 Cal.3d 626, 108 Cal.Rptr. 585, 587, 511 P.2d 33, 35 (1973) (finding a search where police leave the driveway and peek through a two-inch gap in a drawn window shade); *Olivera v. State,* 315 So.2d 487, 491 (Fla.Dist.Ct.App.1975) (finding that police violated defendant's reasonable expectation of privacy by leaving the sidewalk and walking across grass outside apartment building to look into defendant's apartment window); *State v. Harris,* 919 S.W.2d 619, 623-24 (Tenn.Crim.App.1995) (stating that, while officers are free to position

The question before us, therefore, is whether Thielen took extraordinary measures to enable him to view the inside of the apartment. Although it is a close question whether Thielen's location at the time of his observation was legitimate, the totality of his acts makes such a determination unnecessary. For even if we concluded that the area just outside the apartment window was a common area, the fact that Thielen left the sidewalk, walked across the grass, climbed over the bushes, placed his face within 12 to 18 inches of the window and peered through a small gap between the blinds makes it clear that he took extraordinary measures to enable himself to view the inside of a private dwelling. If we conclude that his actions constituted anything other than a search, it is difficult to imagine when we would be able to say that any activity short of an actual physical intrusion of a dwelling would violate a person's expectation of privacy. We therefore hold that Thielen's conduct constituted a search under the Fourth Amendment.[13]

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themselves on a public sidewalk, once they walk around the building or attempt to gaze into a window, their activity becomes a search); *State v. Bowling*, 867 S.W.2d 338, 341-42 (Tenn.Crim.App.1993) (finding a search where an officer in a driveway got down on his hands and knees with his head almost touching the ground to look into a private garage).

[13] The state asserts that Thielen's actions were analogous to those we found to be constitutional in *State v. Buchwald*, 293 Minn. 74, 196 N.W.2d 445 (1972). In *Buchwald*, an officer investigating a report of a marijuana party taking place in several hotel rooms knocked on the defendant's door and, after the defendant opened the door in response, the officer observed several marijuana cigarettes in plain view inside the room. *Id.* at 447. We held that the police officer's actions did not constitute a search. *Id.* at 448. We based our conclusion, however, on the fact the defendant had consented to the officer's "entry" by opening the door:

> The observation into the defendant's open room by the police officer positioned outside the room was not an invasion of defendant's privacy, for the defendant himself opened the door

III. Reasonableness of the Search

[17-20] The Fourth Amendment protects persons from, among other things, unreasonable searches. U.S. const., amend. IV. In order for a search to be reasonable, the police must have both probable cause and a search warrant. *Id.*; *In re Welfare of G. (NMN) M.*, 560 N.W.2d 687,692 (Minn. 1997). In the case at bar, the state conceded that, prior to his observations through Thompson's window, Thielen did not have probable cause to obtain a search warrant. The facts also show that Thielen did not have a search warrant at the time of the observation. Despite these facts, the state now asserts that Thielen's search was reasonable because he had a reasonable basis for believing the occupants of Thompson's apartment were engaged in drug activity and because his search was minimally intrusive.[14] As the Supreme Court made clear in *Katz*, however, conduct that would constitute an illegal search does not become something less merely because the police had reasonable suspicion and embarked on a search of limited

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> voluntarily. He was not compelled to open it and the voluntariness of his doing so was not the less merely because the unknown knocker was a police officer.

Id. at 448. In this case it cannot be said that Carter in any way consented to Thielen's observations.

[14] The state also asserts that Thielen's warrantless search was reasonable because there were exigent circumstances. As we have stated in the past, police can make warrantless arrests, entries and searches of dwellings when they can demonstrate the existence of probable cause and exigent circumstances. *State v. Lohnes*, 344 N.W.2d 605, 610-11 (Minn.1984). Because the state admits that Thielen lacked probable cause, however, any reliance on this exception is misplaced.

intrusiveness.[15] As such, we once again reject the notion that a little bit of information justifies a little bit of a search.

Reversed.

STRINGER, Justice, dissenting.

While I agree with the court's conclusion that the police officer's actions in this case constituted an illegal search under the Fourth Amendment, I believe that Carter failed to show that he had a legitimate expectation of privacy in Thompson's apartment and I therefore dissent.

"The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v. Illinois*, 439 U.S. 128, 131 n. 1, 99 S.Ct. 421, 424 n. 1, 58 L.Ed.2d 387 (citations omitted). A challenge to a search must establish *ab initio* a legitimate expectation of privacy in the invaded place–that is, an expectation of privacy that "society is prepared to recognize as 'reasonable.'" *Id.* at 143-44, n. 12, 99 S.Ct. at 430, n. 12 (quoting *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (Harlan, J., concurring)).

The United States Supreme Court has acknowledged that the mere fact that a person is legitimately on the premises of another is insufficient to give that person standing to contest a search of the other person's premises. *Rakas*, 439 U.S. at 143, 99 S.Ct. at 430. Courts have found a legitimate expectation of privacy to exist where the defendant demonstrated a meaningful connection to the property or the host–for example, where the defendant was related to the host or had been given a key to the premises. *See, e.g., United States v. Haydel*, 649 F.2d 1152 (1981) (holding that defendant had legitimate expectation of privacy in his parent's home to which he had a key and unencumbered access); *Rose v. United States*, 629 A.2d 526 (D.C.App.1993) (holding that defendant had standing to challenge search of close relative's house to which he had a key and was a regular visitor). But standing has been denied where the party alleging an illegal search established no more than that they were a transient visitor to the property of another–where, for example, the defendant was present on the property only to use the telephone or bathroom,[1] was merely a party guest,[2] or otherwise failed to establish a connection to the property beyond simply being

[15] The State argues, and the court of appeals agreed, that Officer Thielen's actions were reasonable under *State v. Crea*, 305 Minn. 342, 233 N.W.2d 736 (1975). In *Crea*, after seeing a stolen snowmobile trailer in plain view outside the appellant's house, the police shined a flashlight into the garage and the basement window of the house and saw two stolen snowmobiles. *Id.* at 738. Without specifically invoking one of the exceptions to the warrant requirement recognized by the Supreme Court, we held that the officers had acted reasonably because: 1) after seeing the stolen snowmobile trailer in the driveway, they had "very strong" probable cause to believe the stolen snowmobiles were in the house; 2) "their intrusion, being visual and involving a basement window only, was minimal"; and 3) the late hour would have made obtaining a warrant difficult. *Id.* at 740. To the extent that *Crea* may be read as establishing that a warrantless search can be justified based on a general finding that it was "reasonable," it runs counter to the Supreme Court's holdings that the fact that an officer reasonably expected to find evidence and used the least intrusive means possible to achieve that end is insufficient to sustain a warrantless search. *See Katz*, 389 U.S. at 356, 88 S.Ct. at 514. Unlike here, the officers in *Crea* had "very strong" probable cause to suspect the stolen snowmobiles were inside the house. Crea, 233 N.W.2d at 740. It was not our intent in *Crea* to step back from the requirement of probable cause and exigent circumstances or to, in any other way, modify our analysis of warrantless searches under the Fourth Amendment.

[1] *See, e.g., United States v. McNeal*, 955 F.2d 1067 (6th Cir.1992) (holding no legitimate expectation of privacy where defendant stated that he had only stopped by the host's home to use the telephone); *State v. Wise*, 879 S.W.2d 494 (Mo. 1994) (holding no legitimate expectation of privacy where defendant had merely entered occupant's apartment to

present at the time of the search.[3] Furthermore, at. least one court has recognized that a defendant present at the time of a narcotics search and a member of a criminal venture does not have a reasonable expectation of privacy sufficient to challenge the unannounced police entry of the apartment of

make a phone call); *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993) (holding that defendant who had only entered neighbor's house to use the bathroom did not have a legitimate expectation of privacy, despite the fact that defendant was occasionally given a key to the house for purpose of using the garden hose).

[2] *See, e.g., United States v. Maddox*, 944 F.2d 1223 (6th Cir.1991) (holding that defendant had no reasonable expectation of privacy where nothing in the record indicated that he was anything other than a transient party guest); *Lewis v. United States*, 594 A.2d 542 (D.C.App.1991) (holding that a mere party guest does not have a reasonable expectation of privacy in the host's home).

[3] *See, e.g., State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996) (holding that defendant did not have standing to challenge search that occurred while he was in neighbor's apartment where he was only an occasional guest at the apartment, possessed no interest in the property and had no freedom to exclude anyone from the premises); *Hill v. United States*, 664 A.2d 347 (D.C.App.1995) (holding that, where there was no evidence that the defendants had a key to their friend's apartment, that they could admit or exclude others from the apartment, or establishing how much time they had spent in the apartment, they had failed to demonstrate a legitimate expectation of privacy); *Prophet v. United States*. 602 A.2d 1087 (D.C.App. 1992) (holding that defendant who had only been at his friend's house a few minutes before the police arrived did not have standing to challenge the entry); *People v. Rodriguez*, 69 N.Y.2d 159, 513 N.Y.S.2d 75, 505 N.E.2d 586 (1987) (holding that defendant found sleeping in the apartment of another had no standing where he was "a transient who had no indicia of legitimate or recognizable connection to the apartment where he was arrested or any relevant thing in that apartment"); *commonwealth v. Tann*, 500 Pa. 593, 459 A.2d 322 (1983) (holding no legitimate expectation of privacy in apartment where defendant was only occasional visitor to apartment, had no possessory or proprietary interest in it, and had been present for only 10-15 minutes prior to search).

another being used as a drug packaging operation. *See United States v. Lockett*, 919 F.2d 585 (9th Cir.1990).[4]

Here, Carter established nothing beyond the fact that he was present in Thompson's apartment for a period of 2 1/2 hours. He introduced no evidence that he had any prior relationship with Thompson, that he had ever been to her apartment before the night of his arrest, that he had personal effects in the apartment, that he had a key to the apartment, that he could invite or exclude others, or that he had any connection with the apartment other than his presence at the time of the search. The record is simply void as to any indicia that Carter was anything more than a brief, transient visitor. On these facts, it cannot be said that Carter met his burden of establishing a reasonable expectation of privacy in the apartment I would therefore hold that Carter did not have standing to challenge the search of the apartment and affirm the decision of the court of appeals.

[4] *Lockett* involved an allegation that the police, in entering an apartment that housed a drug packaging operation, did not comply with the federal "knock-and-announce" statute, 18 U.S.C. § 3109 (1988). However, the standard applied in determining whether the defendant had standing to challenge the entry was the same as that used to determine standing to challenge a search: whether the defendant had "a legitimate expectation of privacy in the property used by the joint venture." 919 F.2d at 588.

KEITH, Chief Justice (dissenting).

I join in the dissent of Justice Stringer.

BLATZ, Justice (dissenting).

I join in the dissent of Justice Stringer.

STATE of Minnesota, Respondent,

v.

Melvin JOHNS, Petitioner, Appellant.

No. C9-95-1765.

Supreme Court of Minnesota.

Sept. 11, 1997.

John M. Stuart, Minnesota State Public Defender by Bradford Colbert, Assistant State Public Defender, St. Paul, for Appellant.

Hubert H. Humphrey, III, Minnesota Attorney General, St. Paul, James C. Backstrom, Dakota County Attorney by Phillip D. Prokopowicz, Assistant Dakota County Attorney, Hastings, for Respondent.

Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

The defendant, Melvin Johns, is a co-defendant of Wayne Thomas Carter. The facts **{missing}** legal issues are identical in both cases.

Based on our reasoning in the companion **{missing}** *of State v. Carter*, 569 N.W.2d 169, 178 **{missing}** (Minn.), the decision of the court of appeals is reversed.

STRINGER, Justice (dissenting).

For the reasons set forth in my dissent in *State v. Carter*, I respectfully dissent.

KEITH, Chief Justice (dissenting).

I join in the dissent of Justice STRINGER.

BLATZ, Justice (dissenting).

I join in the dissent of Justice STRINGER.

STATE OF MINNESOTA

IN COURT OF APPEALS

CX-95-1368

Dakota County — Davies, Judge

Dist. Ct. File K994985

State of Minnesota,

Respondent,

Hubert H. Humphrey III
Attorney General
1400 NCL Tower
445 Minnesota St.
St. Paul, MN 55101

James C. Backstrom
Dakota County Attorney
Phillip D. Prokopowicz
Assistant County Attorney
1560 W. Highway 55
Hastings, MN 55033

vs.

Wayne Thomas Carter,

Appellant.

John M. Stuart
State Public Defender
Scott G. Swanson
Assistant State Public Defender
2829 University Ave. S.E.
Suite 600
Minneapolis, MN 55414

Filed April 9, 1996
Office of Appellate Courts

SYLLABUS

1. A business caller, in contrast to a social guest, is without sufficient "presence" to have a reasonable expectation of privacy in an apartment and, as such, lacks standing to assert a claim of unlawful search.

2. The following do not require a downward sentencing departure: no criminal history; business and personal success; and downward departure recommendation from probation officer.

Affirmed.

Considered and decided by Parker, Presiding Judge, Schumacher, Judge, and Davies, Judge.

OPINION

DAVIES, Judge

Appellant Wayne Thomas Carter, who was arrested after a visual search through an apartment window, challenges the legality of the search. He also challenges imposition of the presumptive sentence. We affirm.

FACTS

On May 15, 1994, a citizen told Police Officer Jim Thielen (officer) that there was drug activity in a nearby apartment. This informant told the officer that, while walking past a garden-level apartment window, he saw people packaging a white powder in plastic bags. The informant also told the officer that there was a blue four-door Cadillac with Illinois license plates nearby that possibly belonged to the people in the apartment.

After talking to the informant, the officer proceeded to the apartment building and, while standing on the front lawn, approximately 12-18 inches from a garden-level window, looked through a gap in the window blinds. He saw three people--two males and a female--working at a kitchen table. The males were putting small amounts of white powder into plastic bags, which the female then cut off for sealing. The officer observed the three people for 15 minutes, during which time they filled five or six bags.

The officer then contacted a South Metro Drug Task Force officer, who applied for a search warrant for both the car and the apartment. The suspects' car left the premises and the police arrested its occupants before the search warrant was obtained. The officer recognized appellant Wayne Carter, the car's driver, and Melvin Johns, the car's passenger, as the two males he had seen in the apartment.

Police seized an automatic pistol (which was in plain view) from the passenger-side floor. When they later received and executed the search warrant for the car, the police recovered a black leather bag containing 47.1 grams of cocaine packaged in plastic bags, along with pagers and a scale.

Carter was found guilty, on stipulated facts, of conspiracy to commit a controlled substance crime in the first degree in violation of Minn. Stat. §§ 152.021, subd. 1(1), and 609.05 (1992) (count I), and controlled substance crime in the first degree (aiding and abetting) under Minn. Stat. §§ 152.021, subd. 2(1), and 609.05 (1992) (count II).

Carter was sentenced (only on count I) to the presumptive guidelines sentence of 86 months in prison. He now appeals, challenging the legality of the search and the failure to depart downward from the presumptive sentence.

ISSUES

I. Does Carter have standing to object to the officer's visual search?

II. Did the court err in failing to depart downward from the presumptive sentence?

ANALYSIS

I. Standing

As a threshold matter, the trial court ruled that Carter, as a short-duration caller, had no standing to object to the officer's peering into the apartment window. Carter disagrees and argues that his status, which he claims was as an "invited houseguest," is one to which society is willing to give an "expectation of privacy" and Fourth Amendment protection. On these stipulated facts, this presents a question of law, which we review de novo. ***Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n,*** 358 N.W.2d 639, 642 (Minn. 1984).

> [C]apacity to claim the protection of the Fourth Amendment depends * * * upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.

Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 430 (1978) (citing ***Katz v. United States,*** 389 U.S. 347, 353, 88 S. Ct. 507, 512 (1967)). A subjective expectation of privacy is legitimate if it is "one that society is prepared to recognize as 'reasonable.'" ***Katz,*** 389 U.S. at 361, 88 S. Ct. at 516 (Harlan, J., concurring).

As support for their respective conclusions, Carter and the state (as did the trial court) cite ***Minnesota v. Olson,*** 495 U.S. 91, 110 S. Ct. 1684 (1990). In ***Olson,*** the police made a warrantless, nonconsensual entry into a house and arrested Olson. ***Id.*** at 93-94, 110 S. Ct. at 1686-87. The United States Supreme Court, in affirming the Minnesota Supreme Court, held that ***Olson,*** as an overnight houseguest, had a reasonable expectation of privacy in the house protected by the Fourth Amendment. ***Id.*** at 96-97, 110 S. Ct. at 1688. Carter argues that the ***Olson*** holding applies to him.

The trial court stated that Carter presented no evidence--other than that he was an out-of-state resident--to show that his status created a reasonable expectation of privacy. We agree with the trial court's assessment.

Olson suggests that staying overnight in another's home is indicative of a sufficient "presence." Carter presents no evidence he was an overnight guest, and the suggestion that Carter may raise Fourth Amendment objections to a search of the premises solely because he was legitimately on the premises has been rejected as "too broad a gauge for measurement of Fourth Amendment rights." ***Rakas,*** 439 U.S. at 142, 99 S. Ct. at 429. The "legitimate expectation of privacy" standard requires a stronger presence than mere legitimate presence.

Overline v. State, Comm'r of Pub. Safety, 406 N.W.2d 23 (Minn. App. 1987), shows that an overnight stay is not necessarily required for standing. In ***Overline,*** an intoxicated man ran his truck off the highway into some trees, injuring his hand. ***Id.*** at 25. The man telephoned friends for a ride, they presumably complied, and shortly thereafter police entered the friends' home without a warrant and found the man. ***Id.*** This court held that the intoxicated man had a "legitimate expectation of privacy" in the home and therefore was entitled to raise a claim that the police violated his Fourth Amendment

rights by entering the home without a warrant. ***Id.*** at 27. No Fourth Amendment violation was found, however. ***Id.*** at 28.

Carter's presence here falls short of that in ***Overline,*** just as it falls short of ***Olson.*** Contrary to ***Overline,*** Carter's claim that he was predominantly a social guest in the apartment is inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose--to package drugs. This defeats the "legitimate expectation of privacy" standard, which requires "more than a subjective expectation of not being discovered." ***Rakas,*** 439 U.S. at 143 n.12, 99 S. Ct. 430 n.12. Carter's "presence" at the apartment was thus insufficient to give him standing. We affirm the trial court's conclusion that Carter lacks standing to object to the officer's observation of activities inside the apartment.

Having concluded that Carter lacks standing to object to the search, we do not reach his claim that the police search violated his Fourth Amendment right to be free from unreasonable searches.

II. Sentence

Carter claims that the court abused its discretion in sentencing him to the 86-month presumptive term. The supreme court has stated the applicable standard of review for a refusal to depart:

> [W]e do not intend entirely to close the door on appeals from refusals to depart [from the presumptive sentence]. However, we believe that it would be a rare case which would warrant reversal of the refusal to depart. * * * [T]he Guidelines state that when substantial and compelling circumstances are present,

> the judge "may" depart. This means that the ***trial court has broad discretion*** and that we generally will not interfere with the exercise of that discretion.

State v. Kindem, 313 N.W.2d 6, 7 (Minn. 1981) (emphasis added) (citation omitted). A sentencing judge may depart from the sentencing guidelines if "substantial grounds exist which tend to excuse or mitigate the offender's culpability, although not amounting to a defense." Minn. Sent. Guidelines II.D.2.a.(5).

Carter contends that three factors constitute "substantial grounds" tending to excuse or mitigate his culpability: (1) he has no criminal history; (2) he has succeeded at a number of endeavors (business and personal); and (3) the probation officer recommended a short prison term because he believed that Carter does not appear to be a risk to the community. We disagree that these grounds require departure.

Carter's lack of a prior criminal history is not a mitigating factor, but rather is considered in the sentencing guidelines grid. ***Cf. State v. Brusven***, 327 N.W.2d 591, 593 (Minn. 1982) (because criminal history is considered in determining presumptive sentence, "it generally would be unfair to consider [it] again" as support for departure). Nor are social factors, such as employment history or educational attainment, qualifying factors. Minn. Sent. Guidelines II.D.1.c., d. Finally, a downward departure recommendation in a pre-sentence investigation report is not a delineated factor justifying a departure, and even if it were, the existence of a mitigating factor does "not obligate the court" to grant a downward departure. **State *v. Wall,*** 343 N.W.2d 22, 25 (Minn. 1984).

We recognize "the growing body of evidence relating to '[t]he disparity of sentencing between people of color and whites.'" ***State v. Williams,*** 525 N.W.2d 538, 549 (Minn. 1994). However, the sentencing court's reasons for declining to depart dispositionally--including Carter's failure to

acknowledge the extent of his involvement in cocaine distribution and the amount of drugs confiscated--supports the court's refusal to depart. The court acted within its discretion.

DECISION

As a short-term business caller, appellant lacks standing to object to a search of the apartment. The court did not abuse its discretion in sentencing appellant to the presumptive term.

Affirmed.

/S/
Judge Jack Davies

April 2, 1996

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (1994).

STATE OF MINNESOTA
IN COURT OF APPEALS
C9-95-1765

State of Minnesota,
Respondent,

vs.

Melvin Johns,
Appellant.

Filed June 11, 1996
Affirmed
Kalitowski, Judge

Dakota County District Court
File No. K394982

Hubert H. Humphrey III, Attorney General, 1400 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101 (for Respondent)

James C. Backstrom, Dakota County Attorney, Phillip D. Prokopowicz, Assistant County Attorney, 1560 West Highway 55, Hastings, MN 55033 (for Respondent)

Bradford Colbert, Assistant State Public Defender, William Mitchell College of Law, 875 Summit Avenue, LEC 304, St. Paul, MN 55015 (for Appellant)

Considered and decided by Randall, Presiding Judge, Kalitowski, Judge, and Schultz, Judge.*

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Melvin Johns challenges his convictions for first-degree controlled substance and conspiracy offenses based on: (1) the legality of the police officer's search; and (2) the district court's refusal to allow his public defender to argue lenity to the jury. We affirm.

D E C I S I O N

I.

On review, this court accepts a trial court's findings of fact on Fourth Amendment issues, unless clearly erroneous, and independently applies Fourth Amendment case law to the facts so found. ***State v. Saffeels,*** 484 N.W.2d 429, 430 (Minn. App. 1992) (citing ***State v. Storvick***, 428 N.W.2d 55, 58 n.1 (Minn. 1988)), ***review denied*** (Minn. June 1, 1992).

1. Standing

The Constitutions of both the United States and Minnesota protect citizens from unreasonable search and seizure. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The initial inquiry in every search and seizure case is whether the defendant has standing to object to the search or seizure.

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

State v. Sorenson, 441 N.W.2d 455, 457 (Minn. 1989). Standing exists when the person challenging the search has a reasonable expectation of privacy in the area searched. ***Rakas v. Illinois,*** 439 U.S. 128, 143, 99 S. Ct. 421, 430 (1978); ***id.***

This court recently held Johns's co-conspirator lacked standing to challenge the officer's search because the motive for his presence in the apartment at issue was illegal business rather than social interaction. ***State v. Carter,*** 545 N.W.2d 695, 698 (Minn. App. 1996). Here, because we conclude Johns's Fourth Amendment claims fail on the merits, we do not determine whether Johns had standing to challenge the officer's search.

2. Fourth Amendment challenges

Assuming standing exists, Johns raises Fourth Amendment challenges based on invasion of the curtilage and the officer's visual search of the apartment.

The Fourth Amendment protects the home and its curtilage from unreasonable searches and seizures. ***Oliver v. United States,*** 466 U.S. 170, 180, 104 S. Ct. 1735, 1742 (1984). Police may, without a warrant, enter the areas of the curtilage impliedly open to use by the public. ***State v. Crea,*** 305 Minn. 342, 346, 233 N.W.2d 736, 739 (1975). In doing so, they are free to keep their eyes open and use their other senses. ***Id.*** Once police step off the area open to public use without a warrant, the test becomes whether the police acted reasonably. ***Id.*** at 346, 233 N.W.2d at 740. In determining the reasonableness of the officers' search, the reviewing court considers: (1) the intrusiveness of the search; (2) whether the officers had probable cause to believe evidence of criminal activity would be found; and (3) whether the officers would have difficulty obtaining a search warrant at that hour. ***Id.*** at 346-47, 233 N.W.2d at 740.

Here, a confidential informant told the officer he had just seen through a window of the apartment at issue three persons packaging drugs. To corroborate the informant's story, the officer walked to the apartment complex, stood 12 to 18 inches from the window and observed the three persons inside packaging drugs at the kitchen table for approximately 15 minutes.

We conclude the officer acted reasonably by walking up to the window and making the initial glance inside and by continuing to look in the window in an attempt to corroborate the informant's story. First, the supreme court has stated that the

> lands adjoining a multiple-occupancy residence are less likely to receive Fourth Amendment protection than the yard of a single-family residence because the privacy expectation as to such an area is often diminished because it is not subject to the exclusive control of one tenant and is utilized by tenants generally and the numerous visitors attracted to a multiple-occupancy building.

State v. Krech, 403 N.W.2d 634, 637 (Minn. 1987) (quoting 1 W. LaFave, Search and Seizure § 2.3(f) at 414 (1987)). Second, the officer's search was visual, never disturbing the persons inside the apartment and not requiring the officer to remove obstacles to see through the window. Third, because of the informant's detailed firsthand description of the drug activity, the search is entitled to greater weight under the totality of the circumstances test for determining probable cause. ***See Illinois v. Gates,*** 462 U.S. 213, 234, 103 S. Ct. 2317, 2330 (1983). Fourth, the officer sought search warrants immediately and procured such warrants in the middle of the night before physically searching the apartment. Accordingly, we conclude the visual search was part of a logical in-the-field

investigative technique, to which this court accords deference. ***See State v. Alayon,*** 459 N.W.2d 325, 330 (Minn. 1990). Because no Fourth Amendment violation occurred, the district court properly admitted the evidence against Johns.

II.

The supreme court has determined the jury in a criminal case has the power of lenity, that is, the power to acquit despite the law and the facts. ***State v. Perkins,*** 353 N.W.2d 557, 561 (Minn. 1984). A defendant does not, however, have the right to an instruction informing the jury of its power of lenity. ***Id.*** at 562. We conclude the district court did not err in refusing to allow defendant's counsel to argue lenity to the jury in opening argument when the court had already determined the legality of the officer's actions through the omnibus hearing. ***See id.*** (referring approvingly to ***United States v. Brown,*** 548 F.2d 204, 210 (7th Cir. 1977), which held the trial court may bar a defense attorney from arguing lenity to the jury).

Affirmed.

S/Thomas Kalitowski
6-5-96

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff, ORDER PURSUANT TO OMNIBUS HEARING

vs.

Wayne Thomas Carter,

Defendant.

File No. K9-94-0985

This matter came on for omnibus hearing before the undersigned Judge of District Court on the 21st day of September, 1994, at the Dakota County Judicial Center, Hastings, Minnesota.

Phillip Prokopowicz, Assistant Dakota County Attorney, appeared on behalf of the State of Minnesota; Bruce Cowan, Esq. and David Holman, Esq., appeared on behalf of Defendant.

Based upon the files, records, and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. On May 15, 1994, Officer Thielen of the Eagan Police Department received information from an individual described as a "confidential informant" that suspected drug

activity was being conducted at 3943 South Valley View Drive, apartment 103 in Eagan, Minnesota.

2. The confidential informant informed Officer Thielen that he/she observed the drug activity as he/she walked by the apartment window.

3. The individual indicated that he/she observed people sitting in the apartment around a table which had white powder on it.

4. The individual further advised Officer Thielen that the people inside the apartment were "bagging" the white powder.

5. The individual also stated that he/she believed a vehicle, described as a blue four door Cadillac with Illinois plate number SGD-896, was being used by the occupants of apartment number 103.

6. In response to this information, Officer Thielen went to the apartment complex and approached the apartment window. The time was approximately 8:00 p.m.

7. To approach the apartment in question, Officer Thielen left the common sidewalk used to enter the apartment building and walked on a grassy common area to the window of the apartment.

8. Officer Thielen stood approximately 12 to 18 inches from the apartment window. The horizontal mini-blinds were drawn; however, gaps existed in the blinds through which Officer Thielen could see activity in the apartment.

9. While looking through the gaps in the blinds, Officer Thielen observed three individuals, two male and one female, sitting at a kitchen table.

10. One of the males appeared to be placing a white powdery substance onto the kitchen table. He then passed the white substance to the second male, who placed the powder into a plastic bag. The second male gave plastic bag to the female who cut off the ends of the bag and placed it on the table.

11. The officer observed this activity for approximately 15 minutes. He then left the apartment complex to phone Officer Kallestad of the South Metro Drug Task Force. After Officer Thielen's initial 15 minute observation, the apartment, its occupants and the apartment complex went unobserved by any officer for one and one-half hours.

12. Officer Thielen spoke to Officer Kallestad and reported his findings.

13. Based upon the conversation with Officer Thielen, Officer Kallestad proceeded to have search warrants prepared for the suspected apartment and a vehicle identified as a 1985 blue four door Cadillac, Illinois license plate number SGD-896.

14. At approximately 10:30 p.m. an Eagan police officer observed two male individuals putting items into the Cadillac identified by Officer Thielen's confidential informant.

15. When the vehicle attempted to leave the parking lot it was stopped by the Eagan Police Department.

16. The vehicle was detained and Defendant was identified as the driver and owner of the vehicle. Police told Defendant and his passenger to get out of the car. As the police opened the door to allow the passenger to get out of the car, the police saw a black zippered pouch and a handgun on the floor of the vehicle near the right front seat. The Defendant and the passenger were then placed under arrest.

17. The vehicle was then towed to the Eagan Police Department and impounded, but not searched at that time.

18. At approximately 1:30 a.m. on May 16, 1994, the officers executed a search warrant on the vehicle, and discovered approximately 40 grams of a white mixture, pagers, and a scale. The white mixture later tested positive for cocaine.

19. Both the State and Defendant stipulated that the only lessee of apartment number 103 was Kimberly Thompson.

20. Defendant is a resident of Chicago, Illinois.

21. No evidence was presented as to Defendant's status in the apartment other than he was viewed by Officer Thielen as being in the apartment for a period of a few hours on May 15, 1994.

22. The affiant who provided the application for the issuance of a search warrant and an affidavit in support thereof did not include material misstatements of fact as to invalidate the search warrant.

23. The affiant who provided the application for the issuance of a search warrant and an affidavit in support thereof did not deliberately or recklessly misrepresent any statements of fact as to invalidate the search warrant.

24. Subsequent to his arrest, Defendant was charged with two separate counts of controlled substance crime in the first degree.

CONCLUSIONS OF LAW

1. Defendant does not have standing to challenge whether Officer Thielen's initial observations into Kimberly Thompson's apartment on May 15, 1994 violated his rights under the United Stated Constitution or the Minnesota State Constitution.

2. Even if Defendant were found to have standing, the State of Minnesota has alleged sufficient facts to support a finding that observations made by Officer Thielen do not constitute an illegal search, in violation of the Fourth Amendment to the United States Constitution or Article I, Section 10 of the Minnesota Constitution.

3. As the registered owner of the vehicle in question, Defendant does have standing to challenge the validity of the stop and subsequent search of the vehicle.

4. Officer Thielen and the Eagan Police had an articulable and reasonable basis to stop Defendant's vehicle on May 15, 1994.

5. Officer Thielen and the Eagan Police had probable cause to seize the vehicle on May 15, 1994 when they observed a handgun and black zippered pouch.

6. The State of Minnesota has alleged sufficient facts to support a finding of probable cause to execute a search warrant for Defendant Carter's vehicle based upon Officer Thielen's initial observations through the apartment window. The search warrant executed by the police for Defendant's vehicle was valid as the affidavits the warrant relied upon established probable cause for the search and did not include false, material information that was recklessly submitted by the applicant for the search warrant.

ORDER

1. Defendant's motion to suppress all evidence obtained as a result of Officer Thielen's initial observations of apartment number 103 located at 3943 South Valley View Drive in Eagan, Minnesota on May 15, 1994 is hereby DENIED.

2. Defendant's motion to suppress all evidence obtained as a result of the search of Defendant's vehicle, a 1985 Cadillac, Illinois license plate number SGD-896,, on May 16, 1994, Defendant's vehicle is hereby DENIED.

3. A "not guilty" plea is entered on behalf of Defendant Carter.

4. The above-entitled matter is hereby set on for jury trial at 9:00 a.m. on Tuesday, January 17, 1995 at the Dakota County Judicial Center, Hastings, Minnesota.

5. The attached memorandum is incorporated in and made part of this Court's FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

Dated this 16th day of December, 1994.

BY THE COURT:

/S/
Robert F. Carolan
Judge of District Court

MEMORANDUM

Defendant challenges the search and seizure of the physical evidence involved in the instant case. His argument is three-fold: (1) The observation of Officer Thielen from the grounds adjacent to Kimberly Thompson's garden level apartment was an illegal search of said premises; (2) the subsequent stop of Defendant's vehicle was not valid; and (3) the affidavits relied upon for the execution of the search warrant for Defendant's vehicle was based on statements that were "recklessly false" and lacked sufficient probable cause.

I. STANDING

The Defendant was observed by Officer Thielen as an occupant of the apartment while he made his observations through the apartment window. No evidence was presented at the hearing that Defendant had lived at this apartment long term, was an overnight guest or was related to the leaseholder. The only evidence presented showed that Defendant was a resident of Chicago, Illinois and had been at the apartment for a period of a few hours on May 15, 1994, during the police observation.

"The Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 430, 58 L.Ed.2d 387 (1978) (citations omitted). An expectation of privacy is "legitimate" if it is one that society is prepared to recognize as reasonable. Id. at 143-44, n.12 (citation omitted). Legitimacy, however, means more than a subjective expectation of not being discovered. Id.

In Minnesota v. Olson, 495 U.S. 91, 110 S. Ct. 1684, 109 L.Ed.2d 85 (1990), police suspected Olson of being the driver

of a car used in a robbery-murder. The day after the robbery-murder, police received a call from a woman living in a duplex that a man who claimed he was the driver of a vehicle used in a robbery was staying in the unit upstairs. The unit in which Olson was staying was leased to the caller's daughter. The police stayed away from the duplex until they were notified Olson was at the duplex. When officers approached the duplex unit and told Olson to come out, they heard a male voice say, "tell them I left." The officers then entered the unit, without consent, and arrested Olson.

The United States Supreme Court held that Olson, as an overnight guest, demonstrated that he had a sufficient enough connection with the duplex unit to be treated like a homeowner and that the arrest, therefore, was illegal. Olson, 495 U.S. at 100. The Court further held that as an overnight guest, Olson had a reasonable expectation of privacy and had standing to challenge his arrest since society recognizes this expectation as reasonable. Id. at 97. "Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society." Id. at 98.

No evidence was presented by Defendant that his status in Ms. Thompson's apartment was similar to Olson or that his status was one that was envisioned to be protected under the Olson rationale. The only evidence presented showed Defendant as an out of state resident who had been at the apartment for a period of time on May 15, 1994. Without more evidence the Court cannot conclude that Defendant's expectation of privacy in the apartment was based upon "understandings that are recognized and permitted by society," and therefore legitimate. As such, the Court determines that based upon the evidence presented Defendant does not have standing to challenge the search made by Officer Thielen into Kimberly Thompson's apartment.

II. OFFICER THIELEN'S INITIAL OBSERVATIONS THROUGH KIMBERLY THOMPSON'S WINDOW

Officer Thielen did not violate Defendant's constitutional right against unreasonable searches and seizures because the officer's observations were made from an area in which Defendant had no "reasonable expectation of privacy." The observations made by the officer were made from a common area opened to the public and other occupants of the apartment complex were limited to articles in plain sight.

Once Officer Thielen spoke to the anonymous individual who identified the apartment in question, he approached the apartment which was at garden level. A garden level apartment is one that a part of the apartment is below ground and if one looked though a window at full height that person would have to look downward to see the furniture of the apartment. While standing on the grounds outside the window of the apartment, the officer peered through the mini-blinds. The officer testified that there were gaps in the blinds which allowed him to view activity in the apartment. While looking downward and through the window, the officer observed Defendant and two other individuals bagging white powder. After observing this conduct for a period of time, he called his supervisor who proceeded to execute search warrants of the apartment and a vehicle identified by the anonymous individual as belonging to one of the apartment's occupants.

Unlike a single family dwelling, an apartment complex shares its sidewalks, grounds and corridors amongst all its residents. While the federal and state constitutions protect against unreasonable searches of one's home and surrounding curtilage, the Court must determine whether the ground the officer stood upon while observing the apartment is the kind envisioned to be within the curtilage of the apartment and therefore protected from unreasonable searches.

A four factor test has been used in Minnesota to determine whether an area claimed as curtilage and the extension of an individual's expectation of privacy to that area is protected. The four factors are: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of uses to which the area is put; and, (4) the steps taken by the residents to protect the area from observation by people passing by. State v. Krech, 403 N.W.2d 634, 636-37 (Minn. 1987).

When applying the factors to the instant case it becomes apparent that Defendant did not have an expectation of privacy from the location where Officer Thielen made his observations outside Ms. Thompson's window. First, while the proximity of the area to Ms. Thompson's window is quite close, the nature of the grounds as being common to all residents detracts from the closeness of the claimed curtilage area to Ms. Thompson's apartment. Ms. Thompson did not own the land immediately outside her window and could not claim any particular exclusive rights to said land. Second, the area is not within an enclosure surrounding the home. There is no fence blocking entrance to this spot from the public. There are no bushes or trees planted immediately in front of the window to create an enclosure type space that prevents the public from gaining entrance to the area. Third, the nature to which this area is put favors the position that this ground is not curtilage to her apartment. This area is a common area open to all residents of the apartment complex. Though the area is not a ball field, exhibits 8, 9, 15, 16 and 17 show that the public had access to the area directly in front of Ms. Thompson's windows to store bicycles. Residents obviously must leave the common sidewalk leading up to the building to deposit their bicycles and other items. Fourth, while Ms. Thompson did make an attempt to protect her apartment from

observation by drawing the blinds, no attempt was made to protect the area claimed as curtilage from passerby.

In support of his argument that the ground stood upon is protected as curtilage due to the fact that it was private ground in which no invitation was extended to the officer, Defendant relies upon Lorenza, et al. v. Superior Court, 9 Cal. 3d. 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973). In that case an officer approached a single family home and left the sidewalk approaching the home to look through a window that was not accessible through normal routes. The appellate court held that such an observation was unreasonable and violated the defendant's constitutional rights.

The Lorenza case is, however, distinguishable from the instant case. The instant case does not involve a single family home on private land. The apartment in this case was surrounded by property used by the entire apartment complex. Exhibits 8, 9, 15, 16 and 17 show a bicycle leaned up next to the apartment window of the apartment in question. Someone had to have left the sidewalk to put the bicycle there. There was also testimony that the complex housed families and it was common to see children and others leave the sidewalk areas and walk freely on the grassy areas of the complex. There does not appear to be any posted signs informing apartment residents or there guests to stay off the grass. And although bushes are planted at an angle off the sidewalk in front of one of the apartment's windows, there was no evidence presented that the bushes were planted for privacy reasons and not for aesthetic reasons.

Though Minnesota has no rule which deals with the specific facts of the instant case, the supreme court in State v. Buchwald, 196 N.W.2d 445 (Minn. 1972), acknowledged the reduced expectation of privacy over areas adjacent to motel rooms. "Granted that a [motel] tenant has standing to protect the room he occupies, there is nevertheless an element of public or shared property in motel surroundings that is entirely

lacking in the enjoyment of one's home." Id. at 448. Once it is determined that the area adjacent to an apartment window is not private but is common grounds for the entire complex, Buchwald would suggest that such an area would lose any constitutional protection. As the exhibits show, residents did walk upon and use the grassy area in front of Ms. Thompson's window. This evidence demonstrates that the area was common ground for the complex and therefore is not within the curtilage of the apartment Defendant occupied. As such, Defendant had no expectation of privacy in this area and the officer's observations did not constitute a search.

III. STOP OF DEFENDANT'S VEHICLE

After observing the incident inside the apartment, Officer Thielen called Officer Kallestad of the South Metro Drug Task Force for instructions. Officer Kallestad advised Officer Thielen to observe the individuals in the apartment and to stop the individuals if they attempted to leave the area. After a period of time, Officer Thielen and other Eagan police officers observed the Defendant and another male leaving the apartment with a black zippered bag. These two individuals got into the vehicle which was described earlier by the confidential informant and drove away. Eagan police subsequently stopped the vehicle, later identified as owned by Defendant, and told the two individuals to get out of the vehicle. Upon opening the passenger side door to allow the passenger to exit the vehicle, the police saw in plain view the black zippered bag and a handgun. Defendant and the other male were then placed under arrest. Defendant contends the stop of the vehicle was in violation of his constitutional rights.

In interpreting the state constitution the Minnesota Supreme Court in Matter of Welfare of E.D.J., 502 N.W.2d 779 (1993), held that when determining whether an investigatory "seizure" of the defendant occurred by the police

the test is if the court can determine objectively, on the basis of the totality of the circumstances whether a reasonable person having the defendant's perspective would have concluded he was not free to leave. E.D.J., 502 N.W.2d at 780. If a seizure is determined to have occurred by the court then the question becomes whether the police articulated a sufficient basis for suspecting the particular person stopped of criminal activity. Id. at 783. "The suspicion that the officer must be able to articulate must be more than an unarticulated 'hunch,' the officer must be able to point to something that objectively supports his position." State v. Johnson, 444 N.W.2d 824, 825-26 (Minn. 1989).

In the instant case, the actions by the police created the seizure of Defendant as they stopped the vehicle with flashing lights and approached the automobile slowly with guns drawn. Based upon the earlier observations of Officer Thielen as well as the vehicle description given to Officer Thielen by the anonymous person, the police have articulated a sufficient basis for the stop. Officer Thielen observed two individuals leaving the apartment building and identified them as the same two males in the apartment bagging white powder. The officer knew the vehicle had Illinois plates and could leave the area permanently. He testified that his training had also told him that automobiles are highly common in the transportation of narcotics. He could have reasonably concluded that these two individuals knew something about the activity involving the white powder in the apartment complex and possibly were in possession of some or all of this powder while in the vehicle. He could reasonably suspect that the white powder was contraband in view of how it was being handled in Ms. Thompson's apartment. He therefore formed an articulable basis to believe these two men were involved in criminal activity.

IV. STATEMENTS IN THE SUPPORTING AFFIDAVITS

Defendant contends that police officers recklessly included false statements in the supporting affidavits relied upon by the Hon. George Hoey who issued the search warrants in the instant case. Therefore he argues the evidence seized pursuant to the warrants should be excluded from evidence. The burden of proof in establishing the existence of false statements or misrepresentations is on the Defendant to override the "presumption of validity with respect to affidavit(s) supporting search warrant(s)' and demonstrate that the statement is false. Franks v. Delaware, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L.Ed.2d 667, -- (1978). The determination has already been made that Defendant lacks standing to challenge of Officer Thielen's initial observations into Kimberly Thompson's apartment. Defendant, therefore, lacks the standing to challenge the issuance of the search warrant for Kimberly Thompson's apartment. He does have standing to challenge the search warrant that was issued for his vehicle.

In State v. Causey, 257 N.W.2d 288, 291 (Minn. 1977), the supreme court adopted a two-prong test to determine whether the particular statements used in an affidavit are of such a nature as to invalidate a search warrant: (1) whether the misstatement of fact in the affidavit is material to the determination of probable cause; and, (2) if the misstatement is material, it must be determined whether the police officer or other agent deliberately or recklessly misrepresented the fact. Causey, 257 N.W.2d at 292-93. Innocent misrepresentation, even though material to the determination of probable cause, is insufficient to invalidate a warrant. Id. at 291.

In the instant case, Defendant asserts that Officer Kallestad in his affidavit in support of the application for the issuance of search warrants misled the judge by implying that

an ongoing investigation occurred regarding drug activity in the apartment complex. Specifically, the affidavit states that "during May of 1994," Officer Thielen was contacted by a confidential informant regarding drug activities at the complex. See Exhibit 1. The burden is on Defendant to show this statement is deliberately false. No additional evidence was presented by Defendant other than the statement contradicts with the later statement in the affidavit describing Officer Thielen's observations occurring on May 15, 1994, thereby implying that an investigation was ongoing. Additionally, though the statement can be construed as misleading, the statement cannot be said to form the basis of probable cause for these search warrants. The material determination of probable cause is based upon Officer Thielen's observations of the apartment and not the statement that could appear to state that "an investigation was ongoing." Even if the Court were to determine the statement was misleading, it is not a material misstatement to the determination of probable cause because probable cause for the issuance of a warrant was established solely by Officer Thielen's own observations into the apartment and other information he received from his confidential informant. Defendant's argument fails the two-prong Causey test.

Defendant also cites the statement in Officer Kallestad's affidavit that the apartment was kept under constant surveillance after Officer Thielen's initial observations as deliberately false and misleading. Again, Defendant fails to meet his burden under the Causey test. Defendant fails to show by additional proof that Officer Kallestad's statement was deliberately misleading. Also, the statement was not determinative of being material in forming probable cause. Although Officer Thielen left the scene for 90 minutes to call Officer Kallestad, this statement is not material to forming probable cause. Officer Thielen's observations themselves are the material portion of the affidavit.

V. AFFIDAVITS AND ISSUE OF PROBABLE CAUSE

Defendant lastly contends that the search warrants were issued without sufficient probable cause and are therefore invalid.

The Fourth Amendment of the United States Constitution as well as article I section 10 of the Minnesota Constitution prohibits searches and seizures of people and places without probable cause. For a warrant to issue, a neutral magistrate or judge must find, within the warrant application and supporting affidavits, probable cause to believe that certain property was involved in a crime or possession of the property is a crime. See Minn. Stat. § 626.07. The test for probable cause is met if the affidavits, interpreted in a reasonable manner under the totality of the circumstances, sets forth competent evidence leading a reasonable, prudent person to believe that there is a basis for the search or articles sought are located in a certain area.

When a Court reviews the sufficiency of probable cause on a search warrant affidavit, a balance must be struck between an individual's Fourth Amendment right and the need for some leeway in law enforcement for society's protection. Brinegar v. U.S., 338 U.S. 160, 176, 69 S. Ct. 1302, 1311, -- L.Ed.2d -- (1949). In Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983), the Supreme Court created the standard of review in determining the sufficiency of search warrant affidavits: "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238, 103 S. Ct. at 2332. Among factors to consider by the Court are "type of crime, nature of items sought, extent of a suspects opportunity for concealment and normal inferences as to where suspects would keep items." State v. Pierce, 358

N.W.2d 672, 673 (Minn. 1984). When reviewing an issuance of a search warrant, the Court should give deference to the probable cause determination of the issuing judge and reverse only where no substantial basis for probable cause can be found. Massachusetts v. Upton, 466 U.S. 727, 104 S. Ct. 2085, 80 L.Ed.2d 721 (1984).

The supporting affidavits in the instant case is based upon sufficient facts to enable an independent judge to determine probable cause existed. This is done primarily through Officer Thielen's observations through the apartment window whereby he saw individuals bagging a white powder. Based upon his training and experience, he was able to conclude that such activity is consistent with drug packaging. Therefore, a review of the entire affidavit creates a "fair probability" that contraband or evidence of a crime will be found in a particular place.

R.F.C.

Supreme Court, U.S.
FILED
FEB 6 1998
CLERK

No. 97-1147

In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA,

Petitioner,

vs.

WAYNE THOMAS CARTER AND MELVIN JOHNS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Minnesota

BRIEF IN OPPOSITION OF PETITIONER STATE OF MINNESOTA

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18 pp

QUESTIONS PRESENTED

1. Does an invited guest of an apartment have standing to object to the police peering into the apartment without a warrant?

2. Does a police officer who enters private property, walks across the grass, climbs over bushes, crouches down and places his face 12 to 18 inches from a window in order to peep through a slight gap in drawn blinds conduct a search?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Wayne Carter and Melvin Johns respectfully request that the United States Supreme Court deny the petition for writ of certiorari seeking review of the decisions of the Minnesota Supreme Court in *State v. Carter*, 569 N.W.2d 169, 176 (Minn. 1997) and *State v. Johns*, 569 N.W.2d 180 (Minn. 1997).[1]

STATEMENT OF THE CASE AND THE FACTS

The Minnesota Supreme Court found the facts as follows:

> At approximately 8 p.m. on the evening of May 15, 1994, an anonymous informant approached Eagan police officer Jim Thielen. The informant, whom Thielen never had seen before, told Thielen that he/she[2] had walked by apartment 103 at 3943 South Valley View Drive and observed people sitting around a table inside the apartment "bagging" a white powder.

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[1] *State v. Carter* and *State v. Johns* are companion cases with identical facts and legal issues. The Minnesota Supreme Court discussed the issues and the facts in *State v. Carter*; in *State v. Johns* the court simply noted that the facts and issues were identical and reversed the conviction. *State v. Johns*, 569 N.W.2d at 181. Because the facts and issues are identical, respondents are filing just one brief in opposition.

[2] Thielen testified at the omnibus hearing that he spoke with the confidential informant for 15 to 25 minutes. He gave no further detail, however, about what their conversation involved, stating that to do so would reveal the informant's identity.

The informant also told Thielen that he/she believed the occupants of the apartment had used a blue four-door Cadillac located in the parking lot adjacent to the apartment complex. The informant also told Thielen that the car had an Illinois license plate that read SGD 896. In response to this information, Thielen went to the complex and approached the ground floor window of apartment 103. Thielen then walked toward the window of the apartment by leaving the common sidewalk that led to the apartment building's entrance and stepping on a grassy common area closer to the window. Thielen then walked behind some short bushes located in front of the apartment window and stood approximately 12 to 18 inches from the window. The window blinds were drawn closed, but gaps in the blinds allows Thielen to observe activity in the apartment. While looking through the gaps in the blinds, Thielen observed two males and one female sitting at a kitchen table. One of the males appeared to be placing a white powdery substance onto the kitchen table. This person then would pass the white substance to the second male who then would place the powder into a plastic bag. The second male, who was wearing bedroom slippers, would in turn give the plastic bag to the female who would cut off the ends of the bag and place it on the table.

After observing this activity for approximately 15 minutes, Thielen left the apartment complex and went to a nearby fire station where he had another conversation with the informant and another Eagan police officer. At this time the informant told the officers that the people inside the apartment might be in possession of a gun. Thielen then returned to the apartment

complex where he located a Cadillac matching the description given by the informant. He then returned to the fire station, telephoned Officer Kevin Kallestad of the South Metro Drug Task Force, and reported what he had seen. Kallestad instructed Thielen to stop and secure the suspect vehicle should anyone attempt to drive it away. Police also began to prepare affidavits as part of a request for warrants to search both the apartment and the Cadillac.

At approximately 10:30 p.m., an Eagan police officer observed two males putting items into the suspect Cadillac. The two males then entered the vehicle and started to drive it out of the parking lot. As per instructions, Eagan police stopped the vehicle at the intersection of Rahn Road and Beau de Rue Drive. The police found Carter in the driver's seat and Melvin Johns in the passenger's seat. The police ordered both men out of the car. As the police opened the door to let Johns out of the car, they observed a black zippered pouch and a handgun, later determined to be loaded, on the floor of the vehicle. The police then placed Carter and Johns under arrest. The police subsequently towed the Cadillac to the Eagan Police Department, and after receiving the signed search warrant at approximately 1:30 a.m. on May 16, the police searched the vehicle. When the officers opened the black zippered pouch, they discovered a white mixture in plastic baggies, Johns' identification, pagers, and a scale. Tests later determined that the white mixture was 47.1 grams of cocaine.

Later in the evening of May 15, after the arrests of Carter and Johns, Eagan police

returned to apartment 103 and arrested its occupant, Kimberly Thompson.[3] At approximately 3 a.m. on May 16, police executed a search warrant on the apartment and located cocaine residue on the kitchen table and plastic baggies consistent with those found in the automobile driven by Carter. Thielen subsequently identified Carter, Johns and Thompson as the individuals he had observed in the apartment packaging the white mixture. He identified Carter as the individual he had seen putting the white mixture on the table and dividing it into piles, Johns as the man who wore slippers and placed the piles into baggies, and Thompson as the individual who cut the ends off the baggies and placed the baggies in piles. Police ultimately learned that Carter and Johns were residents of Chicago, Illinois, and that Thompson was the sole lessee of apartment 103. Subsequent to his arrest, Carter made a statement to the police in which he admitted ownership of a duffel bag found inside the Cadillac. A search of the duffel bag uncovered a digital gram scale containing traces and residue of cocaine. Johns made a statement to police admitting he had accepted a proposal to transport cocaine from Illinois to Minnesota for money, and that he, Carter and Thompson had packaged the cocaine at Thompson's apartment. He also admitted that there were approximately two ounces of crack cocaine and a handgun in the vehicle.

State v. Carter, 569 N.W.2d at 171-173.

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[3] Thompson was a co-defendant in the omnibus hearing. She subsequently pled guilty and is not a party to this appeal.

Both Carter and Johns filed motions to suppress their statements and the evidence seized as a result of Theilen's actions. The trial court found that respondents did not have standing to contest Theilen's actions. *State v. Carter*, 569 N.W.2d at 173.

Following the district court's denial of their motion to suppress, Carter and Johns were found guilty, in separate trials, based on stipulated facts. Carter appealed to the Minnesota Court of Appeals which concluded that Carter did not have standing to object to the search. *State v. Carter*, 545 N.W.2d 695, 698 (Minn. Ct. App. 1996), *reversed* 569 N.W.2d 169 (Minn. 1997).

Johns also appealed to the Minnesota Court of Appeals. The court of appeals affirmed the trial court; however, the court of appeals did not address the standing issue. Instead, the court of appeals concluded that no Fourth Amendment violation occurred. *State v. Johns*, C9-95-1765 (Minn. Ct. App. June 11, 1996), *reversed* 569 N.W.2d 180 (Minn. 1997).

The Minnesota Supreme Court accepted review of both cases. The Minnesota Supreme Court held that Carter and Johns had standing to object to the legality of Theilen's actions because "society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task." *State v. Carter*, 569 N.W.2d at 176.

The supreme court went on to hold that Thielen's conduct constituted a search and, because Thielen did not have probable cause or a warrant, the search violated Carter and Johns constitutional rights. *Id.* at 178.

REASONS FOR DENYING PETITION

There are no sound reasons for granting certiorari in this case, much less the "compelling reasons" required by this Court. The decision of the Minnesota Supreme Court relies on well-established precedent from this Court and, contrary to the State's assertions, charts no new territory.

I.

THE MINNESOTA SUPREME COURT, RELYING ON WELL-ESTABLISHED PRECEDENT FROM THE UNITED STATES SUPREME COURT, CORRECTLY HELD THAT AN INVITED GUEST OF AN APARTMENT HAS STANDING TO OBJECT TO THE POLICE PEERING INTO THE APARTMENT WITHOUT A WARRANT.

"[T]he Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). "[T]he protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." *Mancusi v. DeForte*, 392 U.S. 354, 368 (1968).

In determining who has standing to claim the protections of the Fourth Amendment, the determinative question is "whether the person who claims the protection has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). "A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable." *Minnesota v. Olson*, 495 U.S. 91, 95 (1990) (citations omitted).

Before *Rakas v. Illinois*, the determinative question was whether a person was "legitimately on the premises." *See Jones v. United States*, 362 U.S. 257 (1960). Petitioner claims that the Minnesota Supreme Court "has reverted back to the 'legitimately on the premises' standard specifically rejected under *Rakas* and *Olson*." Petitioner's petition for certiorari, p. 17. The Minnesota Supreme Court did not use the "legitimately on the premises standard;" rather, the court set out the proper standard and then came to the unremarkable conclusion that "society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task." *State v. Carter*, 569 N.W.2d 169, 176 (Minn. 1997).

In setting out the law, the Minnesota Supreme Court obviously relied on the appropriate standard; the court specifically stated that being legitimately on the premises is not sufficient to establish standing. *State v. Carter*, 569 N.W.2d at 176, n. 8. In addition, the court quoted at length from the two cases petitioner claims the court ignored:

> The question before us, therefore, is whether Carter had a legitimate expectation of privacy in Thompson's apartment.
>
> A defendant has a legitimate expectation of privacy when his or her subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" *Rakas v. Illinois* at 143-144, n. 12 (quoting *Katz v. United States*, 389 U.S. at 361 (Harlan, J. concurring)). In other words, a criminal defendant must make two showings to establish that he or she based the motion to suppress upon an alleged violation of

> his or her individual Fourth Amendment right. First, he or she must show a subjective expectation of privacy, and second, he or she must show that this expectation was reasonable in light of "longstanding social customs that serve functions recognized as valuable by society." *Olson*, 495 U.S. at 95.

State v. Carter, 569 N.W.2d at 176.

After setting out the proper standard, the Minnesota Supreme Court painstakingly reviewed the record to determine whether respondents met that standard. *State v. Carter*, 569 N.W.2d at 174-176. After its painstaking review, the court concluded that respondents had the leaseholder's permission to be inside the apartment and that they remained inside the apartment for at least 2½ hours, during which time they worked with the leaseholder on a common task. *State v. Carter*, 569 N.W.2d at 176. The court then held that "society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task." *Id.*

The Minnesota Supreme Court's holding is consistent with this court's holding in *Rakas v. Illinois* and *Minnesota v. Olson*. It is not necessary for the United States Supreme Court to accept review simply to affirm its holdings in *Rakas v. Illinois* and *Minnesota v. Olson*.

Petitioner also suggests that this Court should accept review because the Minnesota Supreme Court decided an "important question of federal constitutional law." Respondent's brief, p. 17. The important federal question purportedly decided by the Minnesota Supreme Court

was whether a person has standing when the sole purpose for his presence in the residence is to engage in illegal activities.

There are a number of problems with this claim.

First, petitioner did not argue the legality or illegality of respondents' conduct at the trial court and therefore waived this issue. Petitioner must not be allowed to present an argument to this court that it did not present to the trial court.

Second, the Minnesota Supreme Court did not address the legality or illegality of respondents' conduct in determining that they had standing to object to the search. Instead, the court based its conclusion on three factors: (1) respondents had the leaseholder's permission to be inside the apartment; (2) respondents remained inside the apartment for at least 2½ hours; and (3) while respondents were in the apartment, they worked with the leaseholder on a common task. *State v. Carter*, 569 N.W.2d at 176. The court then held that "society does recognize as valuable the right or property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task." *Id.*

The third problem with petitioner's claim is that there is no split of authority concerning this issue. While there is the odd, in both sense of the word, case that has held that one is not entitled to standing if the presence was for the purpose of engaging in criminal conduct, *see, e.g., State v. Keeling*, 182 N.E.2d 60 (Ohio Com.P. 1962), none of the federal cases cited by petitioner stand for this proposition.[4]

---

[4] Petitioner cites four federal cases that purportedly support the proposition that one is not entitled to standing if his

The final, and most important, problem with petitioner's theory is that it is untenable; "to deny standing merely because it turns out the defendant had a criminal purpose is in sharp conflict with the rationale underlying the exclusionary rule." 5 W. LaFave, *Search and Seizure A Treatise on the Fourth Amendment* 145 (3rd Ed. 1996).

The primary purpose of the exclusionary rule is to deter the police from conducting unreasonable searches and seizures. "The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960).

If a defendant who engaged in illegal conduct did not have standing to object to the police invasion of his privacy, the police would have no incentive to abide by the Fourth Amendment. The police could simply raid a home or an office in the hopes of finding something incriminating. If the police find something incriminating,

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presence was for the purpose of engaging in criminal conduct; none of the cases stand for this proposition. Instead, the federal courts, like the Minnesota Supreme Court, simply examined the defendants' connections to the place being searched. *See, e.g., United States v. Garcia*, 741 F.2d 363, 366 (11th Cir. 1984) (court held that the defendant did not have standing because "[h]is contacts with the apartment, at least on the evidence appearing in the record, were not regular or personal enough to establish an expectation of privacy"); *United States v. Hicks*, 978 F.2d 722, 724 (D.C. Cir. 1992) (court held that the defendant did not have standing because the defendant simply established that the tenant permitted his presence, nothing more).

the citizen would not object because he had been engaging in illegal conduct. And if the police do not find anything incriminating, there is "no practical redress" for the invasion of one's personal liberty, even if innocent. *Id.* at 217. The result would be many more unlawful searches and seizures.

Respondent had a legitimate expectation of privacy in the apartment where they were staying. Accordingly, they had standing to object to the police invasion of that privacy.

II.

THE UNANIMOUS DECISION OF THE MINNESOTA SUPREME COURT – THAT A POLICE OFFICER WHO ENTERED PRIVATE PROPERTY, WALKED ACROSS THE GRASS, CLIMBED OVER BUSHES, CROUCHED DOWN AND PLACED HIS FACE 12 TO 18 INCHES FROM A WINDOW IN ORDER TO PEEP THROUGH A SLIGHT GAP IN DRAWN BLINDS IS CONDUCTING A SEARCH IS NOT CONTRARY TO ANY DECISION OF THIS COURT.

Respondents were in a garden level apartment when their activities were observed by a police officer through a window to that apartment. The state has argued that ruling that this observation, made by an officer's unaided sight, is not a search. *See* Petitioner's petition at 24-28. As noted by the Minnesota Supreme Court, the officer did not simply go to an area normally traversed by people walking in the common area of this apartment building,

the officer went to a place where no one goes (without engaging in the illegal act of window-peeping[5]):

> It was only after [the officer] left the sidewalk, walked across the grass, climbed over some bushes, crouched down and placed his face 12 to 18 inches from the window that [the defendants'] activities became observable.

Carter, 516 N.W.2d 169 (Minn. 1997). The state has argued that the police officer's actions were actually a "minor" intrusion when compared to other police intrusions sanctioned by this court. *See* state's petition at 28. This court has never sanctioned this sort of an intrusion; the state cites only *Katz v. United States*, 389 U.S. 347 (1967), *Florida v. Riley*, 488 U.S. 445 (1989), and *California v. Ciraola*, 476 U.S. 207 (1986) in support of the dubious contention that this court has sanctioned the window-peeping in this case. *Ciraola* and *Riley* did not involve any entry upon private property by the officers involved; the officer in this case entered onto private property and climbed over bushes intended to provide the inhabitants of that private property with some level of privacy. And *Katz*, of course, involved the improper use of devices used by officers to

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[5] The officer's behavior is against the law in Minnesota; it is commonly called window-peeping.

Interference with privacy:

> Any person who enters upon another's property and surreptitiously gazes, stares, or peeps in the window of a house or place of dwelling of another with intent to intrude upon or interfere with the privacy of a member of the household thereof is guilty of a misdemeanor.

Minn. Stat. § 609.746 (1996).

enhance their senses; to see and hear things they normally could not.

This court has never upheld anything close to the window-peeping present in this case; the Minnesota Supreme Court's unanimous ruling in this respect is hardly contrary to any decision of this court, and certiorari as to this issue should be denied.

CONCLUSION

The Minnesota Supreme Court held that: (1) an invited guest of an apartment has standing to object to the police peering into the apartment without a warrant; and (2) a police officer who entered private property, walked across the grass, climbed over bushes, crouched down and placed his face 12 to 18 inches from a window in order to peep through a slight gap in drawn blinds, is conducting a search. Both conclusions are supported by

well-established precedent from this Court. Accordingly, the State's petition for writ of certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 97-1147

In the

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA,

Petitioner,

vs.

WAYNE THOMAS CARTER, AND
MELVIN JOHNS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

JOINT APPENDIX

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Appendix I: Exhibits from Omnibus Hearing: *State of Minnesota vs. Wayne Thomas Carter; State of Minnesota vs. Melvin NMN Johns* I-1

STATE of Minnesota, Respondent,

v.

Wayne Thomas CARTER,
petitioner, Appellant.

No. CX-95-1368.

Supreme Court of Minnesota.

Sept. 11, 1997.

Following denial of his motion to suppress, defendant was convicted, in the District Court, Dakota County, Mary E. Pawlenty, J., of controlled substance offenses. Defendant appealed. The Court of Appeals, 545 N.W.2d 695, Davies, J., affirmed. Defendant again appealed. The Supreme Court, Tomljanovich, J., held that: (1) defendant had standing to assert unconstitutionality of search of premises not under his control; (2) officer's observations of interior of apartment constituted "search" for Fourth Amendment purposes whether or not made from apartment's curtilage; and (3) search was not reasonable.

Reversed.

Stringer, J., dissented with opinion in which Keith, C.J. and Blatz, J., joined.

1. Criminal Law 🔑 1139

Supreme Court reviews *de novo* district court's denial of motion to suppress, where facts of case are not in dispute.

2. Criminal Law 🔑 394.5(2)

Criminal defendant seeking to suppress evidence on basis that it was obtained in violation of Fourth Amendment must show that he or she is proper party to assert claim of illegality and to seek remedy of exclusion, and must demonstrate: that he or she has adversary interest in outcome; and that such adverse interest is based upon alleged violation of defendant's rights, rather than violation of rights of some third party. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures 🔑 162

For purpose of ascertaining standing to challenge constitutionality of search, defendant must show possessory interest in items seized and expectation of privacy in areas searched. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures 🔑 164

For purpose of ascertaining standing to challenge constitutionality of search. defendant against whom allegedly illegally obtained evidence is being offered qualifies as one who has adversary interest. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures 🔑 162

Question of whether defendant challenging constitutionality of search is alleging adverse interest based upon his or her own rights or those of third party turns on determination of whether disputed search infringed interest of defendant which Fourth Amendment was designed to protect; such interest exists where person who claims constitutional protection has legitimate expectation of privacy in invaded place. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures 🔑 162

For purpose of ascertaining standing to challenge constitutionality of search, defendant has "legitimate

expectation of privacy" in premises searched, as required to establish violation of his individual Fourth Amendment right, where his subjective expectation of privacy is one that society is prepared to recognize as reasonable; defendant must show both subjective expectation of privacy and that, under totality of circumstances, this expectation was reasonable in light of longstanding social customs that serve functions recognized as valuable by society. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

7. Searches and Seizures 🔑 164

Defendant observed by police, through gap in closed blinds of acquaintance's apartment, preparing cocaine for distribution, had standing to assert unconstitutionality of search; defendant's subjective expectation of privacy was evidenced by fact that he was observed inside apartment of acquaintance with doors shut and blinds drawn, and defendant was type of person who possessed legitimate expectation of privacy in apartment. U.S.C.A. Const.Amend. 4.

8. Searches and Seizures 🔑 162

For purpose of ascertaining standing to challenge constitutionality of search, legitimacy of defendant's expectation of privacy in prentises not under his control does not depend upon defendant's status as "guest" in any formal sense, but rather upon whether status actually enjoyed by defendant is type of longstanding social custom that serves functions recognized as valuable by society. U.S.C.A. Const.Amend. 4.

9. Searches and Seizures 🔑 164

Defendant had leaseholder's permission to be in apartment, worked in concert with leaseholder on common task of dividing and packaging cocaine, and remained in

apartment for at least two and a half hours had standing to challenge constitutionality of search. U.S.C.A. Const.Amend. 4; M.S.A. Const. Art. 1, § 10.

10. Searches and Seizures 🔑 162

For purpose of ascertaining whether particular defendant's possesses legitimate expectation of privacy in searched premises not under his control, society recognizes as valuable right of property owners or leaseholders to invite persons into privacy of their homes to conduct common task, be it legal or illegal activity. U.S.C.A. Const.Amend. 4.

11. Searches and Seizures 🔑 13.1

For constitutional purposes, "search" occurs whenever government agents intrude upon area in which person has reasonable expectation of privacy. U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

12. Searches and Seizures 🔑 17

Fact that police officer was arguably standing outside curtilage of multiple-unit dwelling at time he observed illegal activity occurring inside apartment was insufficient, without more, to establish that his observations were not "search" for Fourth Amendment purposes; focus of curtilage test was area observed rather than area in which officer was standing, and fact that officer was outside curtilage did not eliminate occupant's expectation of privacy within interior of apartment. U.S.C.A. Const.Amend. 4.

13. Searches and Seizures 🔑 17

Not all instances in which police officer looks into interior of house or apartment constitute "search" under Fourth Amendment; fundamental question is whether looking

intruded upon justified expectation of privacy of occupant, which in turn ordinarily requires consideration of location of officer at time of viewing and precise manner in which view was achieved. U.S.C.A. Const.Amend. 4.

14. Searches and Seizures 🔑 26

That which person knowingly exposes to public, even in his own home or office, is not subject to Fourth Amendment protection; Fourth Amendment does not protect activities easily observable by general public. U.S.C.A. Const.Amend. 4.

15. Searches and Seizures 🔑 17

For purpose of determining whether police officer's observations of interior of apartment constituted "search" for Fourth Amendment purposes, apartment leaseholder and others present in apartment did not knowingly expose their activities to public, where apartment blinds were drawn and officer had to take extraordinary measures to be able to observe activities within from outside. U.S.C.A. Const.Amend. 4.

16. Searches and Seizures 🔑 17

Police officer's observations of interior of apartment constituted "search" for Fourth Amendment purposes, whether or not officer was outside building's curtilage at time he made them; apartment leaseholder and others present in apartment did not knowingly expose their activities to public, and officer had to leave sidewalk, walk across grass, climb over bushes, crouch down and place his face 12 to 18 inches from the window to observe activities within. U.S.C.A. Const. Amend. 4.

17. Searches and Seizures 24, 40.1

For search to be reasonable under Fourth Amendment, police must have both probable cause and search warrant. U.S.C.A. Const.Amend. 4.

18. Arrest 63.4(1)

Searches and Seizures 44

Police may constitutionally make warrantless arrests, entries and searches of dwellings if they can demonstrate existence of probable cause and exigent circumstances. U.S.C.A. Const.Amend. 4.

19. Searches and Seizures 23

Conduct that would constitute illegal search does not become something less merely because police had reasonable suspicion and embarked on a search of limited intrusiveness; fact that officer reasonably expected to find evidence and used least intrusive means possible to achieve that end is insufficient to sustain warrantless search. U.S.C.A. Const.Amend. 4.

20. Drugs and Narcotics 185(2)

Search consisting of police officer's observations through blinds covering window of apartment was not "reasonable search" within meaning of Fourth Amendment, despite contention that officer had reasonable basis for believing occupants of apartment were engaged in drug activity and that search was minimally intrusive, where officer lacked either probable cause to obtain search warrant or warrant itself. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

Syllabus by the Court

1. A person who had permission from the leaseholder to be in an apartment, collaborated with the leaseholder on a common task while in the apartment, and remained in the apartment for 2 1/2 hours, had standing to challenge the legality of a search of that apartment under the Fourth Amendment to the United States Constitution, and Article I, Section 10 of the Minnesota Constitution.

2. It was a search when a police officer stepped off the sidewalk, walked across the grass, climbed behind some bushes, and looked into a ground floor apartment by peering through a gap in the closed window blinds from a distance of 12 to 18 inches.

3. Because the officer had neither probable cause nor a warrant, his search of the apartment was unreasonable.

Scott Swanson, Assistant State Public Defender, Minneapolis, for Appellant.

Hubert H. Humphrey III, Attorney General, St. Paul, James C. Backstrom, Dakota County Attorney by Phillip D. Prokopowicz, Assistant Dakota County Attorney, Hastings, for Respondent.

Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

By looking through the gaps in the closed blinds covering a window, a police officer observed the appellant, Wayne Thomas Carter, as he engaged in a drug-packaging operation with two other persons, one of whom was the leaseholder of the apartment. The district court held that Carter, who was an

out-of-state visitor, did not present any evidence to establish his standing to contest the legality of the observation. The court also concluded that the officer did not conduct a search because he made the observations from an area where Carter did not have a reasonable expectation of privacy. The court of appeals affirmed the district court, but based its holding only on the finding that Carter did not have standing to bring a motion to suppress any evidence obtained from the officer's observations. We reverse, and hold that the evidence was sufficient to establish that Carter had standing to challenge the legality of the observation. We further hold that the officer's observation rose to the level of a search, and that the officer's lack of probable cause and a warrant rendered the search unreasonable under the Fourth Amendment of the United States Constitution, and Article I, Section 10 of the Minnesota Constitution.

At approximately 8 p.m. on the evening of May 15, 1994, an anonymous informant approached Eagan police officer Jim Thielen. The informant, whom Thielen never had seen before, told Thielen that he/she[1] had walked by apartment 103 at 3943 South Valley View Drive and observed people sitting around a table inside the apartment "bagging" a white powder. The informant also told Thielen that he/she believed the occupants of the apartment had used a blue four-door Cadillac located in the parking lot adjacent to the apartment complex. The informant also told Thielen that the car had an Illinois license plate that read SGD 896. In response to this information, Thielen went to the complex and approached the ground floor window of apartment 103. Thielen then walked toward the window of the apartment by leaving the common sidewalk that leads to the apartment building's entrance and

[1] Thielen testified at the omnibus hearing that he spoke with the confidential informant for 15 to 25 minutes. He gave no further detail, however, about what their conversation involved, stating that to do so would reveal the informant's identity.

stepping on a grassy common area closer to the window. Thielen then walked behind some short bushes located in front of the apartment window and stood approximately 12 to 18 inches from the window. The windows blinds were drawn closed, but gaps in the blinds allowed Thielen to observe activity in the apartment. While looking through the gaps in the blinds, Thielen observed two males and one female sitting at a kitchen table. One of the males appeared to be placing a white powdery substance onto the kitchen table. This person then would pass the white substance to the second male who then would place the powder into a plastic bag. The second male, who was wearing bedroom slippers, would in turn give the plastic bag to the female who would cut off the ends of the bag and place it on the table.

After observing this activity for approximately 15 minutes, Thielen left the apartment complex and went to a nearby fire station where he had another conversation with the informant and another Eagan police officer. At this time the informant told the officers that the people inside the apartment might be in possession of a gun. Thielen then returned to the apartment complex where he located a Cadillac matching the description given by the informant. He then returned to the fire station, telephoned Officer Kevin Kallestad of the South Metro Drug Task Force, and reported what he had seen. Kallestad instructed Thielen to stop and secure the suspect vehicle should anyone attempt to drive it away. Police also began to prepare affidavits as part of a request for warrants to search both the apartment and the Cadillac.

At approximately 10:30 p.m., an Eagan police officer observed two males putting items into the suspect Cadillac. The two males then entered the vehicle and started to drive it out of the parking lot. As per instructions, Eagan police stopped the vehicle at the intersection of Rahn Road and Beau de Rue Drive. The police found Carter in the driver's seat and

Melvin Johns in the passenger's seat. The police ordered both men out of the car. As the police opened the door to let Johns out of the car, they observed a black zippered pouch and a handgun, later determined to be loaded, on the floor of the vehicle. The police then placed Carter and Johns under arrest. The police subsequently towed the Cadillac to the Eagan Police Department, and after receiving the signed search warrant at approximately 1:30 a.m. on May 16, the police searched the vehicle. When the officers opened the black zippered pouch, they discovered a white mixture in plastic baggies, Johns' identification, pagers, and a scale. Tests later determined that the white mixture was 47.1 grams of cocaine.

Late in the evening of May 15, after the arrests of Carter and Johns, Eagan police returned to apartment 103 and arrested its occupant, Kimberly Thompson.[2] At approximately 3 a.m. on May 16, police executed a search warrant on the apartment and located cocaine residue on the kitchen table and plastic baggies consistent with those found in the automobile driven by Carter. Thielen subsequently identified Carter, Johns and Thompson as the individuals he had observed in the apartment packaging the white mixture. He identified Carter as the individual he had seen putting the white mixture on the table and dividing it into piles, Johns as the man who wore slippers and placed the piles into baggies, and Thompson as the individual who cut the ends off the baggies and placed the baggies in piles. Police ultimately learned that Carter and Johns were residents of Chicago, Illinois, and that Thompson was the sole lessee of apartment 103. Subsequent to his arrest, Carter made a statement to the police in which he admitted ownership of a duffel bag found inside the Cadillac. A search of the duffel bag uncovered a digital gram scale containing traces and residue of cocaine.

[2] Thompson was a co-defendant in the omnibus hearing. She subsequently pled guilty and is not a party to this appeal.

Johns made a statement to the police admitting he had accepted a proposal to transport cocaine from Illinois to Minnesota for money, and that he, Carter and Thompson had packaged the cocaine at Thompson's apartment. He also admitted that there were approximately two ounces of crack cocaine and a handgun in the vehicle.

Carter, Johns and Thompson made motions through joint counsel to suppress their statements and all evidence seized from both the apartment and the Cadillac. They argued, among other things, that Thielen's initial observation through the window of Thompson's apartment was an unreasonable search under the Fourth Amendment and that all evidence obtained as a result of those observations should be excluded as fruit of the poisonous tree. After a two-day omnibus hearing, the district court denied the motions to suppress of Carter and Johns. The court held that the two defendants did not have standing to challenge Thielen's observations through Thompson's window because both defendants failed to present evidence that their expectations of privacy in the apartment were based upon "understandings that are recognized and permitted by society." *See Rakas v. Illinois*, 439 U.S. 128,143-44 n. 12, 99 S.Ct. 421, 430 n. 12, 58 L.Ed.2d 387 (1978); *see also Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). In particular, the court noted that the only evidence presented by the defense showed that the two defendants were out-of-state residents who had been at the apartment for a period of time on May 15, 1994. The district court also concluded that Thielen's observation was not a search within the meaning of the Fourth Amendment because the officer made his observation from an area in which the defendants had no reasonable expectation of privacy.

Following the district court's denial of their motions to suppress, Carter and Johns proceeded with separate counsel. The district court tried Carter on stipulated facts and found

him guilty of conspiracy to commit a controlled-substance crime in the first degree and aiding and abetting a controlled-substance crime in the first degree. Minn. Stat. § 152.021, subd. 1(1), subd. 3(a) (1996); Minn. Stat. § 609.05 (1996). The district court denied Carter's request for a downward departure and sentenced him to 86 months. Carter appealed his conviction, challenging the legality of Thielen's observations through Thompson's apartment window. The court of appeals held that Carter did not have standing to object to Thielen's actions because Carter's claim that he was predominantly a social guest was "inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose–to package drugs." *State v. Carter*, 545 N.W2d 695, 698 (Minn.App.1996).

We therefore begin our analysis by addressing the question of standing, and only if we determine that Carter had standing to bring a motion to suppress evidence recovered as a result of Thielen's observation of the apartment, will we address the legality of Thielen's actions–whether his observation qualified as a search, and if it did, whether it was reasonable.

I. Standing

[1-5] Because the facts of this case are not in dispute, we will review de novo the district court's denial of Carter's motion to suppress. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn.1992). Before a criminal defendant can bring a motion to suppress evidence on the basis that it was obtained in violation of the Fourth Amendment, the defendant must show that he or she is a proper party to assert the claim of illegality and to seek the remedy of exclusion. To establish such a showing, a party must demonstrate two things: First, that he or she has an adverse interest in the outcome. *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 702, 7 L.Ed.2d 663

(1962). And second, that the adverse interest is based upon an alleged violation of the rights of the individual, rather than the violation of the rights of some third party. *Jones v. United States*, 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697 (1960)(overruled on other grounds).[3] As far as the first factor is concerned, a criminal defendant against whom the allegedly illegally obtained evidence is being offered surely qualifies as one who has an adversary interest. *See* 5 Wayne R. LaFave, *Search and Seizure* § 11.3, at 117 (3d ed.1996) (hereinafter LaFave). Consequently we hold that Carter had an adversarial interest in the outcome. The analysis of the second factor is not so easily decided, however. As the United States Supreme Court has told us, the question turns on a "determination of whether the disputed search * * * has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas*, 439 U.S. at 140, 99 S.Ct. at 429. Such an interest exists when "the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Id.* at 143, 99 S.Ct. at 430. The question before us, therefore, is whether Carter had a legitimate expectation of privacy in Thompson's apartment.[4]

[6] A defendant has a legitimate expectation of privacy when his or her subjective expectation of privacy is "one that

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[3] *Jones* was being interpreted as establishing "automatic standing" to challenge the legality of a search for any persons charged with crimes of possession. *United States v. Salvucci*, 448 U.S. 83, 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980). *Salvucci* overruled this holding to establish that the defendant must show a possessory interest in the items seized and an expectation of privacy in the areas searched to establish that he/she had standing to challenge the legality of a search. *Id.*

[4] The district court found that Carter had no expectation of the privacy in the area from which Thielen observed the illegal activity. As we will discuss *infra* in Section II, however, the proper question is whether Carter had an expectation of privacy in the area into which Thielen was looking–namely the inside of the apartment.

society is prepared to recognize as 'reasonable.'" *Id.* at 143-44 n. 12, 99 S.Ct. at 430 n. 12 (quoting *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967)(Harlan, J., concurring)). In other words, a criminal defendant must make two showings to establish that he or she based the motion to suppress upon an alleged violation of his or her individual Fourth Amendment right. First, he or she must show a subjective expectation of privacy, and second, he or she must show that this expectation was reasonable in light of "longstanding social customs that serve functions recognized as valuable by society." *Olson*, 495 U.S. at 98, 110 S.Ct. at 1689.

[7] In the case at bar, it is clear that Carter had a subjective expectation of privacy. He was inside the apartment of an acquaintance with the doors shut and the blinds drawn. The more difficult question is whether Carter's expectation was legitimate, that is, whether the expectation was the type that society is prepared to recognize as reasonable. Both the district court and court of appeals concluded that Carter failed to establish that his subjective expectation was legitimate. The district court based its conclusion on the fact that Carter offered no evidence that his status in relation to the apartment was similar to the status of the defendant in Olson, or that his status was such that it provided a legitimate expectation of privacy in the apartment. Likewise, the court of appeals based its conclusion on the fact that Carter's claim that he was a social guest was inconsistent with the "only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose * * * ." *Carter*, 545 N.W.2d at 698. In both cases, the courts focused on the facts of *Olson*, a case in which there was no dispute that the criminal defendant was an overnight guest of the person who had the possessory interest of the searched

residence.[5] By comparison, it is undisputed that Carter failed to produce any evidence that he was a "guest" of Thompson's, let alone an "overnight guest." But a closer reading of *Olson* reveals that the Supreme Court does not require a person to establish his or her status as either a guest or overnight guest before that person can prove a legitimate expectation of privacy in a location that is searched. Instead, the person must establish only that under the totality of the circumstances, the person's subjective expectation was the type of expectation that "society is prepared to recognize as 'reasonable.'"

[8] Admittedly, such a test is a difficult, one to define, let alone apply. But the Supreme Court's own words offer guidance. "To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society." *Olson*, 495 U.S. at 98, 110 S.Ct. at 1689. In other words, the Court in *Olson* did not recognize the expectation of privacy as legitimate

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[5] The issue of whether a defendant has standing to assert a violation of the Fourth Amendment has a long and muddled history. Throughout the first half of this century, courts decided standing by using common-law concepts of private property. Courts generally found those individuals who had an ownership interest, a leasehold, or "dominion and control" over the searched property to have standing to contest a search of the property. Courts, meanwhile, found that mere "guests" and "invitees" did not have such standing. *Jones*, 362 U.S. at 265-66, 80 S.Ct. at 733 (citations omitted). The Supreme Court rejected this property-based approach in favor of a broad rule that allowed "anyone legitimately on the premises where a search occurs" to challenge its legality by way of a motion to suppress. *Id.* at 267, 80 S.Ct. at 734. The Court later retreated from the "legitimately on the premises" test. *Rakas*, 439 U.S. at 128, 99 S.Ct. at 423. The Court in *Rakas* held that the mere fact that an individual was "legitimately on the premises" was insufficient to give that person standing to contest a search of another's dwelling place. *Id.* at 143, 99 S.Ct. at 430.

merely because the criminal defendant was a *guest*. *See* 5 LaFave, *supra*, § 11.3(b), at 137 (stating that the Court's decision lends "considerable support to the claim that shorter term guests also have standing").[6] Rather, it recognized the defendant's expectation of privacy as legitimate because the criminal defendant's status as a guest was the type of longstanding social custom that serves functions recognized as valuable by society. As the Court went on to state: "The point is that hosts will more likely than not respect the privacy interest of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." *Olson*, 495 U.S. at 99, 110 S.Ct. at 1689. Consequently, if Carter had established that his status is the type that serves functions recognized as valuable by society, his expectation of privacy would have been legitimate.

[9, 10] The stipulated facts show that the apartment's leaseholder allowed Carter and Johns into her apartment for the purpose of packaging cocaine in exchange for one-eighth ounce of cocaine; that Thielen observed all three persons

[6] Many other courts have concluded that *Olson* does not require a criminal defendant to prove his or her status as a guest to establish a legitimate expectation of privacy. *See, e.g., Hill v. United States*, 664 A.2d 347, 352 (D.C. 1995) ("To be sure, being an overnight guest is not the sole means by which one may claim an expectation of privacy in another's home.") (citations omitted); *Davis v. State*, 582 So.2d 61, 61 (Fla.Dist.Ct.App. 1991) ("*Olson* does not necessarily deny standing to one whose status in a residence is less than that of an overnight guest."); *State v. Wright*, 119 N.M. 559, 893 P.2d 455, 459 (N.M.Ct.App.1995) ("[W]e do not read *Olson* to make an individual's overnight status as a houseguest a precondition to the right to assert an invasion of a reasonable expectation of privacy under the Fourth Amendment to the United States Constitution."); *State v. Ackerman*, 499 N.W.2d 882, 884 (N.D.1993) ("[M]uch of the reasoning underlying the Supreme Court's finding of standing on the part of an overnight guest would support standing on the part of other guests, as well * * *.").

inside the apartment as they collaborated to divide and package the cocaine; that Carter and Johns remained inside the apartment for at least 2 1/2 hours, and that Johns was wearing bedroom slippers while inside the apartment.[7] Although we recognize that these facts probably fail to establish Carter as a "guest" of the apartment's leaseholder, we conclude that they were sufficient to prove that Carter was the type of person who possessed a legitimate expectation of privacy in the apartment. After all, Carter had the leaseholder's permission to be inside the apartment.[8] He remained inside the apartment for at least 2 1/2 hours, during which time he worked in concert with the leaseholder on a common task.[9] Whether these facts establish Carter as a

[7] Carter offered evidence of Johns' slippers to show that the two were so comfortable inside the apartment that they must have been guests. While recognizing the relevance of such a fact, we refuse to place a great deal of constitutional significance on a person's footwear. It is interesting to note, however, that another court recently found a lack of standing in part on the fact that one of the defendants "was feigning sleep while fully dressed and wearing *shoes*." *Hill v. United States*, 664 A.2d 347, 350 (D.C. 1995) (emphasis added).

[8] Although the fact that a person is legitimately on the premises is not by itself sufficient to establish standing, *Rakas*, 439 U.S. at 142, 99 S.Ct. at 429, it is important to note that a person who is not legitimately on the premises cannot have standing, 5 LaFave, *supra*, § 11.3(b), at 143. Courts also have concluded that "a showing that a person authorized to do so gave permission for the defendant to be present on that particular occasion" was sufficient to establish the fact that the defendant was legitimately on the premises. *Id.* at 144, 99 S.Ct. at 431

[9] Many courts have denied standing where it is apparent that the party alleging the illegal search was on the property very briefly or had only a minimal connection to the property or the host. *See, e.g., United States v. McNeal*, 955 F.2d 1067 (6th Cir.1992) (finding no legitimate expectation of privacy where defendant stated he had stopped by the host's home only to use the telephone); *Prophet v. United States*, 602 A.2d 1087 (D.C. 1992) (finding no standing where defendant had been at his friend's house for only 3 or 4 minutes prior to the police's entry); *Davis v. State*, 582 So.2d 61 (Fla.Dist.Ct.App.1991) (finding no legitimate expectation of

visitor, invitee or business partner does not matter. As the Court has carefully noted, arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like do not control. *Jones*, 362 U.S. At 266, 80 S.Ct. at 734. What does control, however, is the nature of the relationship between the property possessor and the person alleging the privacy interest in the property. If the relationship is the type that society recognizes as valuable, then we will find standing. If it is not, then we will not. Although society does not recognize as valuable the task of bagging cocaine, we conclude that society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity. We, therefore, hold that Carter had standing to bring his motion to suppress the evidence gathered as a result of Thielen's observations.

II. The Search

[11, 12] Having determined that Carter had standing to assert a violation of the Fourth Amendment, we now turn to the question of whether Thielen's observation constituted a search. A search occurs whenever government agents intrude upon an area where a person has a reasonable expectation of privacy. *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986) (citing *Katz*, 389 U.S. at 360, 88 S.Ct. at 516 (Harlan, J. concurring)). The state argues

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privacy where defendant had been given permission to enter house by occupant's boyfriend, but occupant never had seen the defendant before and was shocked to find him in her apartment); *State v. Wise*, 879 S.W.2d 494 (Mo. 1994) (finding no legitimate expectation of privacy where defendant merely had entered occupant's apartment to make a phone call); *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993) (finding no standing where defendant had entered neighbor's house only to use the bathroom).

Thielen's observations did not rise to the level of a search because he was not inside the leaseholder's "curtilage" when he made his observation. As support for its argument, the state offers *State v. Krech*, 403 N.W.2d 634 (Minn.1987) for the proposition that the common grounds of multi-unit apartment complexes are not entitled to Fourth Amendment protection. In *Krech*, we stated:

> "it is a fair generalization that the lands adjoining a multiple-occupancy residence are less likely to receive Fourth Amendment protection than the yard of a single family residence" because "the privacy expectation as to such an area is often diminished because it is not subject to the exclusive control of one tenant and is utilized by tenants generally and the numerous visitors attracted to a multiple occupancy building."

403 N.W.2d at 637 (quoting 1 Wayne R. LaFave, *Search and Seizure* § 2.3(f), at 414 (2d ed.1987)). The state's argument misses the point of *Krech*, however.

[13] In developing the concept of "curtilage," the Supreme Court actually extended Fourth Amendment protection to those areas so intimately tied to the home itself that an individual reasonably could have expected persons to treat those areas as part of the home. *United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134, 1139, 94 L.Ed.2d 326 (1987). The curtilage cases, therefore, necessarily involve factual scenarios in which police search areas spatially removed from the home itself. *See, e.g., Dunn*, 480 U.S. at 297, 107 S.Ct. at 1137 (agents entered area surrounding barns, 50 feet from house); *Krech*, 403 N.W.2d at 637-38 (police entered yard of duplex where garbage cans were kept). The key question in a curtilage case is not where the police officer was standing when he made his observation, although police officers must establish that they had a legal right to be where

they were at the time of the observation, rather it is the area that was observed. Although it is plausible that Thielen's presence just outside the apartment window was legitimate,[10] the state cannot rely on Thielen's position alone to justify his subsequent observation into the apartment. The fact that a police officer was situated outside a residence's curtilage does not necessarily eliminate the occupant's expectation of privacy within the interior of the dwelling. 1 LaFave, *supra*, § 2.3(d), at 495-96.

> The fundamental question under *Katz is* whether the looking intruded upon the justified expectation of privacy of the occupant. This, in turn, ordinarily requires consideration of two factors: (1) the location of the officer at the time of the viewing; and (2) the precise manner in which the view was achieved.

Id at 497.

[14] This, of course, does not mean that all instances in which a police officer looks into a house or apartment will be a search under the Fourth Amendment. "What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection." *Katz*, 389 U.S. at 351, 88 S.Ct. at 511. We, therefore, have held that police did not violate a homeowner's expectation of privacy by walking onto the homeowner's driveway and observing stolen property that was in plain sight from the driveway. *State v. Crea*, 305 Minn. 342, 346, 233 N.W.2d 736, 739 (1975). Other courts similarly have found no Fourth Amendment protection for activities that are easily observable by the general public.[11]

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[10] It is at least arguable that Thielen's position just outside the apartment window was on a common area and not the curtilage to Thompson's apartment.

[11] *See United States v. Acevedo*, 627 F.2d 68 (7th Cir.1980) (finding no search where police officer looked into an apartment window from a public gangway); *People v. Berutko*, 71 Cal.2d 84, 77 Cal.Rptr. 217, 453

[15,16] People who close their doors and window blinds, however, do not knowingly expose their activities to the public. Consequently, we conclude that Carter, Johns, and Thompson took sufficient precautions to keep their activities private. It was only after Thielen left the sidewalk, walked across the grass, climbed over some bushes, crouched down and placed his face 12 to 18 inches from the window that their activities became observable. As one noted commentator has stated:

> [W]hen police surveillance takes place at a position which cannot be called a "public vantage point," i.e., when the police–though not trespassing on the defendant's curtilage–resort to the extraordinary step of positioning themselves where neither neighbors nor the general public would be expected to be, the observation or overhearing of what is occurring within a dwelling constitutes a Fourth Amendment search. This is really what *Katz* is all about.

1 LaFave, *supra*, § 2.3(d), at 482. Several courts have agreed that it is a search whenever police take extraordinary measures to enable themselves to view the inside of a private structure.[12] The question before us, therefore, is whether

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P.2d 721 (1969) (finding no search where officers on defendant's front porch were able to see illegal activity through an opening in window covering); *People v. Wright*, 41 Ill.2d 170, 242 N.E.2d 180 (1968) (finding no search where officer standing on transit authority right-of-way was able to see through a crack in the window curtain into defendant's apartment); *State v. Taylor*, 61 Ohio App.2d 209, 401 N.E.2d 459 (1978) (finding no search where officers looked into unshaded apartment window from public sidewalk).

[12] *See, e.g., Lorenzana v. Superior Court of Los Angeles County*, 9 Cal.3d 626, 108 Cal.Rptr. 585, 587, 511 P.2d 33, 35 (1973) (finding a search where police leave the driveway and peek through a two-inch gap in a drawn window shade); *Olivera v. State*, 315 So.2d 487, 491 (Fla.Dist.Ct.App.1975) (finding that police violated defendant's reasonable expectation of privacy by leaving the sidewalk and walking across grass

Thielen took extraordinary measures to enable him to view the inside of the apartment. Although it is a close question whether Thielen's location at the time of his observation was legitimate, the totality of his acts makes such a determination unnecessary. For even if we concluded that the area just outside the apartment window was a common area, the fact that Thielen left the sidewalk, walked across the grass, climbed over the bushes, placed his face within 12 to 18 inches of the window and peered through a small gap between the blinds makes it clear that he took extraordinary measures to enable himself to view the inside of a private dwelling. If we conclude that his actions constituted anything other than a search, it is difficult to imagine when we would be able to say that any activity short of an actual physical intrusion of a dwelling would violate a person's expectation of privacy. We therefore hold that Thielen's conduct constituted a search under the Fourth Amendment.[13]

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outside apartment building to look into defendant's apartment window); *State v. Harris*, 919 S.W.2d 619, 623-24 (Tenn.Crim.App.1995) (stating that, while officers are free to position themselves on a public sidewalk, once they walk around the building or attempt to gaze into a window, their activity becomes a search); *State v. Bowling*, 867 S.W.2d 338, 341-42 (Tenn.Crim.App.1993) (finding a search where an officer in a driveway got down on his hands and knees with his head almost touching the ground to look into a private garage).

[13] The state asserts that Thielen's actions were analogous to those we found to be constitutional in *State v. Buchwald*, 293 Minn. 74, 196 N.W.2d 445 (1972). In *Buchwald*, an officer investigating a report of a marijuana party taking place in several hotel rooms knocked on the defendant's door and, after the defendant opened the door in response, the officer observed several marijuana cigarettes in plain view inside the room. *Id.* at 447. We held that the police officer's actions did not constitute a search. *Id.* at 448. We based our conclusion, however, on the fact the defendant had consented to the officer's "entry" by opening the door:

> The observation into the defendant's open room by the police officer positioned outside the room was not an invasion of

III. Reasonableness of the Search

[17-20] The Fourth Amendment protects persons from, among other things, unreasonable searches. U.S. const., amend. IV. In order for a search to be reasonable, the police must have both probable cause and a search warrant. *Id.*; *In re Welfare of G. (NMN) M.*, 560 N.W.2d 687,692 (Minn. 1997). In the case at bar, the state conceded that, prior to his observations through Thompson's window, Thielen did not have probable cause to obtain a search warrant. The facts also show that Thielen did not have a search warrant at the time of the observation. Despite these facts, the state now asserts that Thielen's search was reasonable because he had a reasonable basis for believing the occupants of Thompson's apartment were engaged in drug activity and because his search was minimally intrusive.[14] As the Supreme Court made clear in *Katz*, however, conduct that would constitute an illegal search does not become something less merely because the police had reasonable suspicion and embarked on a search of limited

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> defendant's privacy, for the defendant himself opened the door voluntarily. He was not compelled to open it and the voluntariness of his doing so was not the less merely because the unknown knocker was a police officer.

Id. at 448. In this case it cannot be said that Carter in any way consented to Thielen's observations.

[14] The state also asserts that Thielen's warrantless search was reasonable because there were exigent circumstances. As we have stated in the past, police can make warrantless arrests, entries and searches of dwellings when they can demonstrate the existence of probable cause and exigent circumstances. *State v. Lohnes*, 344 N.W.2d 605, 610-11 (Minn.1984). Because the state admits that Thielen lacked probable cause, however, any reliance on this exception is misplaced.

intrusiveness.[15] As such, we once again reject the notion that a little bit of information justifies a little bit of a search.

Reversed.

STRINGER, Justice, dissenting.

While I agree with the court's conclusion that the police officer's actions in this case constituted an illegal search under the Fourth Amendment, I believe that Carter failed to show that he had a legitimate expectation of privacy in Thompson's apartment and I therefore dissent.

"The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v.*

[15] The State argues, and the court of appeals agreed, that Officer Thielen's actions were reasonable under *State v. Crea*, 305 Minn. 342, 233 N.W.2d 736 (1975). In *Crea*, after seeing a stolen snowmobile trailer in plain view outside the appellant's house, the police shined a flashlight into the garage and the basement window of the house and saw two stolen snowmobiles. *Id.* at 738. Without specifically invoking one of the exceptions to the warrant requirement recognized by the Supreme Court, we held that the officers had acted reasonably because: 1) after seeing the stolen snowmobile trailer in the driveway, they had "very strong" probable cause to believe the stolen snowmobiles were in the house; 2) "their intrusion, being visual and involving a basement window only, was minimal"; and 3) the late hour would have made obtaining a warrant difficult. *Id.* at 740. To the extent that *Crea* may be read as establishing that a warrantless search can be justified based on a general finding that it was "reasonable," it runs counter to the Supreme Court's holdings that the fact that an officer reasonably expected to find evidence and used the least intrusive means possible to achieve that end is insufficient to sustain a warrantless search. *See Katz*, 389 U.S. at 356, 88 S.Ct. at 514. Unlike here, the officers in *Crea* had "very strong" probable cause to suspect the stolen snowmobiles were inside the house. Crea, 233 N.W.2d at 740. It was not our intent in *Crea* to step back from the requirement of probable cause and exigent circumstances or to, in any other way, modify our analysis of warrantless searches under the Fourth Amendment.

Illinois, 439 U.S. 128, 131 n. 1, 99 S.Ct. 421, 424 n. 1, 58 L.Ed.2d 387 (citations omitted). A challenge to a search must establish *ab initio* a legitimate expectation of privacy in the invaded place–that is, an expectation of privacy that "society is prepared to recognize as 'reasonable.'" *Id.* at 143-44, n. 12, 99 S.Ct. at 430, n. 12 (quoting *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (Harlan, J., concurring)).

The United States Supreme Court has acknowledged that the mere fact that a person is legitimately on the premises of another is insufficient to give that person standing to contest a search of the other person's premises. *Rakas*, 439 U.S. at 143, 99 S.Ct. at 430. Courts have found a legitimate expectation of privacy to exist where the defendant demonstrated a meaningful connection to the property or the host–for example, where the defendant was related to the host or had been given a key to the premises. *See, e.g., United States v. Haydel*, 649 F.2d 1152 (1981) (holding that defendant had legitimate expectation of privacy in his parent's home to which he had a key and unencumbered access); *Rose v. United States*, 629 A.2d 526 (D.C.App.1993) (holding that defendant had standing to challenge search of close relative's house to which he had a key and was a regular visitor). But standing has been denied where the party alleging an illegal search established no more than that they were a transient visitor to the property of another–where, for example, the defendant was present on the property only to use the telephone or bathroom,[1] was merely a party guest,[2] or otherwise failed to establish a connection to the property beyond simply being

[1] *See, e.g., United States v. McNeal*, 955 F.2d 1067 (6th Cir.1992) (holding no legitimate expectation of privacy where defendant stated that he had only stopped by the host's home to use the telephone); *State v. Wise*, 879 S.W.2d 494 (Mo. 1994) (holding no legitimate expectation of privacy where defendant had merely entered occupant's apartment to make

present at the time of the search.[3] Furthermore, at. least one court has recognized that a defendant present at the time of a narcotics search and a member of a criminal venture does not have a reasonable expectation of privacy sufficient to challenge the unannounced police entry of the apartment of another being used as a drug packaging operation. *See United States v. Lockett,* 919 F.2d 585 (9th Cir.1990).[4]

Here, Carter established nothing beyond the fact that he was present in Thompson's apartment for a period of 2 1/2 hours. He introduced no evidence that he had any prior relationship with Thompson, that he had ever been to her apartment before the night of his arrest, that he had personal effects in the apartment, that he had a key to the apartment, that he could invite or exclude others, or that he had any connection with the apartment other than his presence at the time of the search. The record is simply void as to any indicia that Carter was anything more than a brief, transient visitor. On these facts, it cannot be said that Carter met his burden of establishing a reasonable expectation of privacy in the apartment I would therefore hold that Carter did not have standing to challenge the search of the apartment and affirm the decision of the court of appeals.

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a phone call); *State v. Baltimore,* 242 Neb. 562, 495 N.W.2d 921 (1993) (holding that defendant who had only entered neighbor's house to use the bathroom did not have a legitimate expectation of privacy, despite the fact that defendant was occasionally given a key to the house for purpose of using the garden hose).

[2] *See, e.g., United States v. Maddox,* 944 F.2d 1223 (6th Cir.1991) (holding that defendant had no reasonable expectation of privacy where nothing in the record indicated that he was anything other than a transient party guest); *Lewis v. United States,* 594 A.2d 542 (D.C.App.1991) (holding that a mere party guest does not have a reasonable expectation of privacy in the host's home).

[3] *See, e.g., State v. Conklin,* 249 Neb. 727, 545 N.W.2d 101 (1996) (holding that defendant did not have standing to challenge search that occurred while he was in neighbor's apartment where he was only an occasional guest at the apartment, possessed no interest in the property and had no freedom to exclude anyone from the premises); *Hill v. United States,* 664 A.2d 347 (D.C.App.1995) (holding that, where there was no evidence that the defendants had a key to their friend's apartment, that they could admit or exclude others from the apartment, or establishing how much time they had spent in the apartment, they had failed to demonstrate a legitimate expectation of privacy); *Prophet v. United States.* 602 A.2d 1087 (D.C.App. 1992) (holding that defendant who had only been at his friend's house a few minutes before the police arrived did not have standing to challenge the entry); *People v. Rodriguez,* 69 N.Y.2d 159, 513 N.Y.S.2d 75, 505 N.E.2d 586 (1987) (holding that defendant found sleeping in the apartment of another had no standing where he was "a transient who had no indicia of legitimate or recognizable connection to the apartment where he was arrested or any relevant thing in that apartment"); *commonwealth v. Tann,* 500 Pa. 593, 459 A.2d 322 (1983) (holding no legitimate expectation of privacy in apartment where defendant was only occasional visitor to apartment, had no possessory or proprietary interest in it, and had been present for only 10-15 minutes prior to search).

[4] *Lockett* involved an allegation that the police, in entering an apartment that housed a drug packaging operation, did not comply with the federal "knock-and-announce" statute, 18 U.S.C. § 3109 (1988). However, the standard applied in determining whether the defendant had standing to challenge the entry was the same as that used to determine standing to challenge a search: whether the defendant had "a legitimate expectation of privacy in the property used by the joint venture." 919 F.2d at 588.

KEITH, Chief Justice (dissenting).

I join in the dissent of Justice Stringer.

BLATZ, Justice (dissenting).

I join in the dissent of Justice Stringer.

STATE of Minnesota, Respondent,

v.

Melvin JOHNS, Petitioner, Appellant.

No. C9-95-1765.

Supreme Court of Minnesota.

Sept. 11, 1997.

John M. Stuart, Minnesota State Public Defender by Bradford Colbert, Assistant State Public Defender, St. Paul, for Appellant.

Hubert H. Humphrey, III, Minnesota Attorney General, St. Paul, James C. Backstrom, Dakota County Attorney by Phillip D. Prokopowicz, Assistant Dakota County Attorney, Hastings, for Respondent.

Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

The defendant, Melvin Johns, is a co-defendant of Wayne Thomas Carter. The facts **{missing}** legal issues are identical in both cases.

Based on our reasoning in the companion **{missing}** *of State v. Carter*, 569 N.W.2d 169, 178 **{missing}** (Minn.), the decision of the court of appeals is reversed.

STRINGER, Justice (dissenting).

For the reasons set forth in my dissent in *State v. Carter*, I respectfully dissent.

KEITH, Chief Justice (dissenting).

I join in the dissent of Justice STRINGER.

BLATZ, Justice (dissenting).

I join in the dissent of Justice STRINGER.

STATE OF MINNESOTA

IN COURT OF APPEALS

CX-95-1368

Dakota County — Davies, Judge

Dist. Ct. File K994985

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1560 W. Highway 55
Hastings, MN 55033

vs.

Wayne Thomas Carter,

Appellant.

John M. Stuart
State Public Defender
Scott G. Swanson
Assistant State Public Defender
2829 University Ave. S.E.
Suite 600
Minneapolis, MN 55414

Filed April 9, 1996
Office of Appellate Courts

SYLLABUS

1. A business caller, in contrast to a social guest, is without sufficient "presence" to have a reasonable expectation of privacy in an apartment and, as such, lacks standing to assert a claim of unlawful search.

2. The following do not require a downward sentencing departure: no criminal history; business and personal success; and downward departure recommendation from probation officer.

Affirmed.

Considered and decided by Parker, Presiding Judge, Schumacher, Judge, and Davies, Judge.

OPINION

DAVIES, Judge

Appellant Wayne Thomas Carter, who was arrested after a visual search through an apartment window, challenges the legality of the search. He also challenges imposition of the presumptive sentence. We affirm.

FACTS

On May 15, 1994, a citizen told Police Officer Jim Thielen (officer) that there was drug activity in a nearby apartment. This informant told the officer that, while walking past a garden-level apartment window, he saw people packaging a white powder in plastic bags. The informant also told the officer that there was a blue four-door Cadillac with Illinois license plates nearby that possibly belonged to the people in the apartment.

After talking to the informant, the officer proceeded to the apartment building and, while standing on the front lawn, approximately 12-18 inches from a garden-level window, looked through a gap in the window blinds. He saw three people--two males and a female--working at a kitchen table. The males were putting small amounts of white powder into plastic bags, which the female then cut off for sealing. The officer observed the three people for 15 minutes, during which time they filled five or six bags.

The officer then contacted a South Metro Drug Task Force officer, who applied for a search warrant for both the car and the apartment. The suspects' car left the premises and the police arrested its occupants before the search warrant was obtained. The officer recognized appellant Wayne Carter, the car's driver, and Melvin Johns, the car's passenger, as the two males he had seen in the apartment.

Police seized an automatic pistol (which was in plain view) from the passenger-side floor. When they later received and executed the search warrant for the car, the police recovered a black leather bag containing 47.1 grams of cocaine packaged in plastic bags, along with pagers and a scale.

Carter was found guilty, on stipulated facts, of conspiracy to commit a controlled substance crime in the first degree in violation of Minn. Stat. §§ 152.021, subd. 1(1), and 609.05 (1992) (count I), and controlled substance crime in the first degree (aiding and abetting) under Minn. Stat. §§ 152.021, subd. 2(1), and 609.05 (1992) (count II).

Carter was sentenced (only on count I) to the presumptive guidelines sentence of 86 months in prison. He now appeals, challenging the legality of the search and the failure to depart downward from the presumptive sentence.

ISSUES

I. Does Carter have standing to object to the officer's visual search?

II. Did the court err in failing to depart downward from the presumptive sentence?

ANALYSIS

I. Standing

As a threshold matter, the trial court ruled that Carter, as a short-duration caller, had no standing to object to the officer's peering into the apartment window. Carter disagrees and argues that his status, which he claims was as an "invited houseguest," is one to which society is willing to give an "expectation of privacy" and Fourth Amendment protection. On these stipulated facts, this presents a question of law, which we review de novo. ***Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n,*** 358 N.W.2d 639, 642 (Minn. 1984).

> [C]apacity to claim the protection of the Fourth Amendment depends * * * upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.

Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 430 (1978) (citing ***Katz v. United States,*** 389 U.S. 347, 353, 88 S. Ct. 507, 512 (1967)). A subjective expectation of privacy is legitimate if it is "one that society is prepared to recognize as

'reasonable.'" ***Katz,*** 389 U.S. at 361, 88 S. Ct. at 516 (Harlan, J., concurring).

As support for their respective conclusions, Carter and the state (as did the trial court) cite ***Minnesota v. Olson,*** 495 U.S. 91, 110 S. Ct. 1684 (1990). In ***Olson,*** the police made a warrantless, nonconsensual entry into a house and arrested Olson. ***Id.*** at 93-94, 110 S. Ct. at 1686-87. The United States Supreme Court, in affirming the Minnesota Supreme Court, held that ***Olson,*** as an overnight houseguest, had a reasonable expectation of privacy in the house protected by the Fourth Amendment. ***Id.*** at 96-97, 110 S. Ct. at 1688. Carter argues that the ***Olson*** holding applies to him.

The trial court stated that Carter presented no evidence--other than that he was an out-of-state resident--to show that his status created a reasonable expectation of privacy. We agree with the trial court's assessment.

Olson suggests that staying overnight in another's home is indicative of a sufficient "presence." Carter presents no evidence he was an overnight guest, and the suggestion that Carter may raise Fourth Amendment objections to a search of the premises solely because he was legitimately on the premises has been rejected as "too broad a gauge for measurement of Fourth Amendment rights." ***Rakas,*** 439 U.S. at 142, 99 S. Ct. at 429. The "legitimate expectation of privacy" standard requires a stronger presence than mere legitimate presence.

Overline v. State, Comm'r of Pub. Safety, 406 N.W.2d 23 (Minn. App. 1987), shows that an overnight stay is not necessarily required for standing. In ***Overline,*** an intoxicated man ran his truck off the highway into some trees, injuring his hand. ***Id.*** at 25. The man telephoned friends for a ride, they presumably complied, and shortly thereafter police entered the friends' home without a warrant and found the man. ***Id.*** This court held that the intoxicated man had a "legitimate expectation of privacy" in the home and therefore was entitled

to raise a claim that the police violated his Fourth Amendment rights by entering the home without a warrant. ***Id.*** at 27. No Fourth Amendment violation was found, however. ***Id.*** at 28.

Carter's presence here falls short of that in ***Overline,*** just as it falls short of ***Olson.*** Contrary to ***Overline,*** Carter's claim that he was predominantly a social guest in the apartment is inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose--to package drugs. This defeats the "legitimate expectation of privacy" standard, which requires "more than a subjective expectation of nct being discovered." ***Rakas,*** 439 U.S. at 143 n.12, 99 S. Ct. 430 n.12. Carter's "presence" at the apartment was thus insufficient to give him standing. We affirm the trial court's conclusion that Carter lacks standing to object to the officer's observation of activities inside the apartment.

Having concluded that Carter lacks standing to object to the search, we do not reach his claim that the police search violated his Fourth Amendment right to be free from unreasonable searches.

II. Sentence

Carter claims that the court abused its discretion in sentencing him to the 86-month presumptive term. The supreme court has stated the applicable standard of review for a refusal to depart:

> [W]e do not intend entirely to close the door on appeals from refusals to depart [from the presumptive sentence]. However, we believe that it would be a rare case which would warrant reversal of

> the refusal to depart. * * * [T]he Guidelines state that when substantial and compelling circumstances are present, the judge "may" depart. This means that the ***trial court has broad discretion*** and that we generally will not interfere with the exercise of that discretion.

State v. Kindem, 313 N.W.2d 6, 7 (Minn. 1981) (emphasis added) (citation omitted). A sentencing judge may depart from the sentencing guidelines if "substantial grounds exist which tend to excuse or mitigate the offender's culpability, although not amounting to a defense." Minn. Sent. Guidelines II.D.2.a.(5).

Carter contends that three factors constitute "substantial grounds" tending to excuse or mitigate his culpability: (1) he has no criminal history; (2) he has succeeded at a number of endeavors (business and personal); and (3) the probation officer recommended a short prison term because he believed that Carter does not appear to be a risk to the community. We disagree that these grounds require departure.

Carter's lack of a prior criminal history is not a mitigating factor, but rather is considered in the sentencing guidelines grid. ***Cf. State v. Brusven***, 327 N.W.2d 591, 593 (Minn. 1982) (because criminal history is considered in determining presumptive sentence, "it generally would be unfair to consider [it] again" as support for departure). Nor are social factors, such as employment history or educational attainment, qualifying factors. Minn. Sent. Guidelines II.D.1.c., d. Finally, a downward departure recommendation in a pre-sentence investigation report is not a delineated factor justifying a departure, and even if it were, the existence of a mitigating factor does "not obligate the court" to grant a downward departure. **State *v. Wall,*** 343 N.W.2d 22, 25 (Minn. 1984).

We recognize "the growing body of evidence relating to '[t]he disparity of sentencing between people of color and whites.'" ***State v. Williams,*** 525 N.W.2d 538, 549 (Minn. 1994). However, the sentencing court's reasons for declining to depart dispositionally--including Carter's failure to acknowledge the extent of his involvement in cocaine distribution and the amount of drugs confiscated--supports the court's refusal to depart. The court acted within its discretion.

DECISION

As a short-term business caller, appellant lacks standing to object to a search of the apartment. The court did not abuse its discretion in sentencing appellant to the presumptive term.

Affirmed.

/S/
Judge Jack Davies

April 2, 1996

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (1994).

STATE OF MINNESOTA
IN COURT OF APPEALS
C9-95-1765

State of Minnesota,
Respondent,

vs.

Melvin Johns,
Appellant.

Filed June 11, 1996
Affirmed
Kalitowski, Judge

Dakota County District Court
File No. K394982

Hubert H. Humphrey III, Attorney General, 1400 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101 (for Respondent)

James C. Backstrom, Dakota County Attorney, Phillip D. Prokopowicz, Assistant County Attorney, 1560 West Highway 55, Hastings, MN 55033 (for Respondent)

Bradford Colbert, Assistant State Public Defender, William Mitchell College of Law, 875 Summit Avenue, LEC 304, St. Paul, MN 55015 (for Appellant)

Considered and decided by Randall, Presiding Judge, Kalitowski, Judge, and Schultz, Judge.*

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Melvin Johns challenges his convictions for first-degree controlled substance and conspiracy offenses based on: (1) the legality of the police officer's search; and (2) the district court's refusal to allow his public defender to argue lenity to the jury. We affirm.

DECISION

I.

On review, this court accepts a trial court's findings of fact on Fourth Amendment issues, unless clearly erroneous, and independently applies Fourth Amendment case law to the facts so found. ***State v. Saffeels,*** 484 N.W.2d 429, 430 (Minn. App. 1992) (citing ***State v. Storvick***, 428 N.W.2d 55, 58 n.1 (Minn. 1988)), ***review denied*** (Minn. June 1, 1992).

1. Standing

The Constitutions of both the United States and Minnesota protect citizens from unreasonable search and seizure. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The initial inquiry in every search and seizure case is whether the defendant has standing to object to the search or seizure.

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

State v. Sorenson, 441 N.W.2d 455, 457 (Minn. 1989). Standing exists when the person challenging the search has a reasonable expectation of privacy in the area searched. ***Rakas v. Illinois,*** 439 U.S. 128, 143, 99 S. Ct. 421, 430 (1978); ***id.***

This court recently held Johns's co-conspirator lacked standing to challenge the officer's search because the motive for his presence in the apartment at issue was illegal business rather than social interaction. ***State v. Carter,*** 545 N.W.2d 695, 698 (Minn. App. 1996). Here, because we conclude Johns's Fourth Amendment claims fail on the merits, we do not determine whether Johns had standing to challenge the officer's search.

2. Fourth Amendment challenges

Assuming standing exists, Johns raises Fourth Amendment challenges based on invasion of the curtilage and the officer's visual search of the apartment.

The Fourth Amendment protects the home and its curtilage from unreasonable searches and seizures. ***Oliver v. United States,*** 466 U.S. 170, 180, 104 S. Ct. 1735, 1742 (1984). Police may, without a warrant, enter the areas of the curtilage impliedly open to use by the public. ***State v. Crea,*** 305 Minn. 342, 346, 233 N.W.2d 736, 739 (1975). In doing so, they are free to keep their eyes open and use their other senses. ***Id.*** Once police step off the area open to public use without a warrant, the test becomes whether the police acted reasonably. ***Id.*** at 346, 233 N.W.2d at 740. In determining the reasonableness of the officers' search, the reviewing court considers: (1) the intrusiveness of the search; (2) whether the officers had probable cause to believe evidence of criminal activity would be found; and (3) whether the officers would have difficulty obtaining a search warrant at that hour. ***Id.*** at 346-47, 233 N.W.2d at 740.

Here, a confidential informant told the officer he had just seen through a window of the apartment at issue three persons packaging drugs. To corroborate the informant's story, the officer walked to the apartment complex, stood 12 to 18 inches from the window and observed the three persons inside packaging drugs at the kitchen table for approximately 15 minutes.

We conclude the officer acted reasonably by walking up to the window and making the initial glance inside and by continuing to look in the window in an attempt to corroborate the informant's story. First, the supreme court has stated that the

> lands adjoining a multiple-occupancy residence are less likely to receive Fourth Amendment protection than the yard of a single-family residence because the privacy expectation as to such an area is often diminished because it is not subject to the exclusive control of one tenant and is utilized by tenants generally and the numerous visitors attracted to a multiple-occupancy building.

State v. Krech, 403 N.W.2d 634, 637 (Minn. 1987) (quoting 1 W. LaFave, Search and Seizure § 2.3(f) at 414 (1987)). Second, the officer's search was visual, never disturbing the persons inside the apartment and not requiring the officer to remove obstacles to see through the window. Third, because of the informant's detailed firsthand description of the drug activity, the search is entitled to greater weight under the totality of the circumstances test for determining probable cause. ***See Illinois v. Gates,*** 462 U.S. 213, 234, 103 S. Ct. 2317, 2330 (1983). Fourth, the officer sought search warrants immediately and procured such warrants in the middle of the night before physically searching the apartment. Accordingly, we conclude the visual search was part of a logical in-the-

field investigative technique, to which this court accords deference. ***See State v. Alayon,*** 459 N.W.2d 325, 330 (Minn. 1990). Because no Fourth Amendment violation occurred, the district court properly admitted the evidence against Johns.

II.

The supreme court has determined the jury in a criminal case has the power of lenity, that is, the power to acquit despite the law and the facts. ***State v. Perkins,*** 353 N.W.2d 557, 561 (Minn. 1984). A defendant does not, however, have the right to an instruction informing the jury of its power of lenity. ***Id.*** at 562. We conclude the district court did not err in refusing to allow defendant's counsel to argue lenity to the jury in opening argument when the court had already determined the legality of the officer's actions through the omnibus hearing. ***See id.*** (referring approvingly to ***United States v. Brown,*** 548 F.2d 204, 210 (7th Cir. 1977), which held the trial court may bar a defense attorney from arguing lenity to the jury).

Affirmed.

S/Thomas Kalitowski
6-5-96

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff, ORDER PURSUANT TO OMNIBUS HEARING

vs.

Wayne Thomas Carter,

Defendant.

File No. K9-94-0985

This matter came on for omnibus hearing before the undersigned Judge of District Court on the 21st day of September, 1994, at the Dakota County Judicial Center, Hastings, Minnesota.

Phillip Prokopowicz, Assistant Dakota County Attorney, appeared on behalf of the State of Minnesota; Bruce Cowan, Esq. and David Holman, Esq., appeared on behalf of Defendant..

Based upon the files, records, and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. On May 15, 1994, Officer Thielen of the Eagan Police Department received information from an individual described as a "confidential informant" that suspected drug

activity was being conducted at 3943 South Valley View Drive, apartment 103 in Eagan, Minnesota.

2. The confidential informant informed Officer Thielen that he/she observed the drug activity as he/she walked by the apartment window.

3. The individual indicated that he/she observed people sitting in the apartment around a table which had white powder on it.

4. The individual further advised Officer Thielen that the people inside the apartment were "bagging" the white powder.

5. The individual also stated that he/she believed a vehicle, described as a blue four door Cadillac with Illinois plate number SGD-896, was being used by the occupants of apartment number 103.

6. In response to this information, Officer Thielen went to the apartment complex and approached the apartment window. The time was approximately 8:00 p.m.

7. To approach the apartment in question, Officer Thielen left the common sidewalk used to enter the apartment building and walked on a grassy common area to the window of the apartment.

8. Officer Thielen stood approximately 12 to 18 inches from the apartment window. The horizontal mini-blinds were drawn; however, gaps existed in the blinds through which Officer Thielen could see activity in the apartment.

9. While looking through the gaps in the blinds, Officer Thielen observed three individuals, two male and one female, sitting at a kitchen table.

10. One of the males appeared to be placing a white powdery substance onto the kitchen table. He then passed the white substance to the second male, who placed the powder into a plastic bag. The second male gave plastic bag to the female who cut off the ends of the bag and placed it on the table.

11. The officer observed this activity for approximately 15 minutes. He then left the apartment complex to phone Officer Kallestad of the South Metro Drug Task Force. After Officer Thielen's initial 15 minute observation, the apartment, its occupants and the apartment complex went unobserved by any officer for one and one-half hours.

12. Officer Thielen spoke to Officer Kallestad and reported his findings.

13. Based upon the conversation with Officer Thielen, Officer Kallestad proceeded to have search warrants prepared for the suspected apartment and a vehicle identified as a 1985 blue four door Cadillac, Illinois license plate number SGD-896.

14. At approximately 10:30 p.m. an Eagan police officer observed two male individuals putting items into the Cadillac identified by Officer Thielen's confidential informant.

15. When the vehicle attempted to leave the parking lot it was stopped by the Eagan Police Department.

16. The vehicle was detained and Defendant was identified as the driver and owner of the vehicle. Police told Defendant and his passenger to get out of the car. As the police opened the door to allow the passenger to get out of the car, the police saw a black zippered pouch and a handgun on the floor of the vehicle near the right front seat. The Defendant and the passenger were then placed under arrest.

17. The vehicle was then towed to the Eagan Police Department and impounded, but not searched at that time.

18. At approximately 1:30 a.m. on May 16, 1994, the officers executed a search warrant on the vehicle, and discovered approximately 40 grams of a white mixture, pagers, and a scale. The white mixture later tested positive for cocaine.

19. Both the State and Defendant stipulated that the only lessee of apartment number 103 was Kimberly Thompson.

20. Defendant is a resident of Chicago, Illinois.

21. No evidence was presented as to Defendant's status in the apartment other than he was viewed by Officer Thielen as being in the apartment for a period of a few hours on May 15, 1994.

22. The affiant who provided the application for the issuance of a search warrant and an affidavit in support thereof did not include material misstatements of fact as to invalidate the search warrant.

23. The affiant who provided the application for the issuance of a search warrant and an affidavit in support thereof did not deliberately or recklessly misrepresent any statements of fact as to invalidate the search warrant.

24. Subsequent to his arrest, Defendant was charged with two separate counts of controlled substance crime in the first degree.

CONCLUSIONS OF LAW

1. Defendant does not have standing to challenge whether Officer Thielen's initial observations into Kimberly Thompson's apartment on May 15, 1994 violated his rights under the United Stated Constitution or the Minnesota State Constitution.

2. Even if Defendant were found to have standing, the State of Minnesota has alleged sufficient facts to support a finding that observations made by Officer Thielen do not constitute an illegal search, in violation of the Fourth Amendment to the United States Constitution or Article I, Section 10 of the Minnesota Constitution.

3. As the registered owner of the vehicle in question, Defendant does have standing to challenge the validity of the stop and subsequent search of the vehicle.

4. Officer Thielen and the Eagan Police had an articulable and reasonable basis to stop Defendant's vehicle on May 15, 1994.

5. Officer Thielen and the Eagan Police had probable cause to seize the vehicle on May 15, 1994 when they observed a handgun and black zippered pouch.

6. The State of Minnesota has alleged sufficient facts to support a finding of probable cause to execute a search warrant for Defendant Carter's vehicle based upon Officer Thielen's initial observations through the apartment window. The search warrant executed by the police for Defendant's vehicle was valid as the affidavits the warrant relied upon established probable cause for the search and did not include false, material information that was recklessly submitted by the applicant for the search warrant.

ORDER

1. Defendant's motion to suppress all evidence obtained as a result of Officer Thielen's initial observations of apartment number 103 located at 3943 South Valley View Drive in Eagan, Minnesota on May 15, 1994 is hereby DENIED.

2. Defendant's motion to suppress all evidence obtained as a result of the search of Defendant's vehicle, a 1985 Cadillac, Illinois license plate number SGD-896, on May 16, 1994, Defendant's vehicle is hereby DENIED.

3. A "not guilty" plea is entered on behalf of Defendant Carter.

4. The above-entitled matter is hereby set on for jury trial at 9:00 a.m. on Tuesday, January 17, 1995 at the Dakota County Judicial Center, Hastings, Minnesota.

5. The attached memorandum is incorporated in and made part of this Court's FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

Dated this 16th day of December, 1994.

BY THE COURT:

/S/
Robert F. Carolan
Judge of District Court

MEMORANDUM

Defendant challenges the search and seizure of the physical evidence involved in the instant case. His argument is three-fold: (1) The observation of Officer Thielen from the grounds adjacent to Kimberly Thompson's garden level apartment was an illegal search of said premises; (2) the subsequent stop of Defendant's vehicle was not valid; and (3) the affidavits relied upon for the execution of the search warrant for Defendant's vehicle was based on statements that were "recklessly false" and lacked sufficient probable cause.

I. STANDING

The Defendant was observed by Officer Thielen as an occupant of the apartment while he made his observations through the apartment window. No evidence was presented at the hearing that Defendant had lived at this apartment long term, was an overnight guest or was related to the leaseholder. The only evidence presented showed that Defendant was a resident of Chicago, Illinois and had been at the apartment for a period of a few hours on May 15, 1994, during the police observation.

"The Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 430, 58 L.Ed.2d 387 (1978) (citations omitted). An expectation of privacy is "legitimate" if it is one that society is prepared to recognize as reasonable. Id. at 143-44, n.12 (citation omitted). Legitimacy, however, means more than a subjective expectation of not being discovered. Id.

In Minnesota v. Olson, 495 U.S. 91, 110 S. Ct. 1684, 109 L.Ed.2d 85 (1990), police suspected Olson of being the driver

of a car used in a robbery-murder. The day after the robbery-murder, police received a call from a woman living in a duplex that a man who claimed he was the driver of a vehicle used in a robbery was staying in the unit upstairs. The unit in which Olson was staying was leased to the caller's daughter. The police stayed away from the duplex until they were notified Olson was at the duplex. When officers approached the duplex unit and told Olson to come out, they heard a male voice say, "tell them I left." The officers then entered the unit, without consent, and arrested Olson.

The United States Supreme Court held that Olson, as an overnight guest, demonstrated that he had a sufficient enough connection with the duplex unit to be treated like a homeowner and that the arrest, therefore, was illegal. Olson, 495 U.S. at 100. The Court further held that as an overnight guest, Olson had a reasonable expectation of privacy and had standing to challenge his arrest since society recognizes this expectation as reasonable. Id. at 97. "Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society." Id. at 98.

No evidence was presented by Defendant that his status in Ms. Thompson's apartment was similar to Olson or that his status was one that was envisioned to be protected under the Olson rationale. The only evidence presented showed Defendant as an out of state resident who had been at the apartment for a period of time on May 15, 1994. Without more evidence the Court cannot conclude that Defendant's expectation of privacy in the apartment was based upon "understandings that are recognized and permitted by society," and therefore legitimate. As such, the Court determines that based upon the evidence presented Defendant does not have standing to challenge the search made by Officer Thielen into Kimberly Thompson's apartment.

II. OFFICER THIELEN'S INITIAL OBSERVATIONS THROUGH KIMBERLY THOMPSON'S WINDOW

Officer Thielen did not violate Defendant's constitutional right against unreasonable searches and seizures because the officer's observations were made from an area in which Defendant had no "reasonable expectation of privacy." The observations made by the officer were made from a common area opened to the public and other occupants of the apartment complex were limited to articles in plain sight.

Once Officer Thielen spoke to the anonymous individual who identified the apartment in question, he approached the apartment which was at garden level. A garden level apartment is one that a part of the apartment is below ground and if one looked though a window at full height that person would have to look downward to see the furniture of the apartment. While standing on the grounds outside the window of the apartment, the officer peered through the mini-blinds. The officer testified that there were gaps in the blinds which allowed him to view activity in the apartment. While looking downward and through the window, the officer observed Defendant and two other individuals bagging white powder. After observing this conduct for a period of time, he called his supervisor who proceeded to execute search warrants of the apartment and a vehicle identified by the anonymous individual as belonging to one of the apartment's occupants.

Unlike a single family dwelling, an apartment complex shares its sidewalks, grounds and corridors amongst all its residents. While the federal and state constitutions protect against unreasonable searches of one's home and surrounding curtilage, the Court must determine whether the ground the officer stood upon while observing the apartment is the kind envisioned to be within the curtilage of the apartment and therefore protected from unreasonable searches.

A four factor test has been used in Minnesota to determine whether an area claimed as curtilage and the extension of an individual's expectation of privacy to that area is protected. The four factors are: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of uses to which the area is put; and, (4) the steps taken by the residents to protect the area from observation by people passing by. State v. Krech, 403 N.W.2d 634, 636-37 (Minn. 1987).

When applying the factors to the instant case it becomes apparent that Defendant did not have an expectation of privacy from the location where Officer Thielen made his observations outside Ms. Thompson's window. First, while the proximity of the area to Ms. Thompson's window is quite close, the nature of the grounds as being common to all residents detracts from the closeness of the claimed curtilage area to Ms. Thompson's apartment. Ms. Thompson did not own the land immediately outside her window and could not claim any particular exclusive rights to said land. Second, the area is not within an enclosure surrounding the home. There is no fence blocking entrance to this spot from the public. There are no bushes or trees planted immediately in front of the window to create an enclosure type space that prevents the public from gaining entrance to the area. Third, the nature to which this area is put favors the position that this ground is not curtilage to her apartment. This area is a common area open to all residents of the apartment complex. Though the area is not a ball field, exhibits 8, 9, 15, 16 and 17 show that the public had access to the area directly in front of Ms. Thompson's windows to store bicycles. Residents obviously must leave the common sidewalk leading up to the building to deposit their bicycles and other items. Fourth, while Ms. Thompson did make an attempt to protect her apartment from

observation by drawing the blinds, no attempt was made to protect the area claimed as curtilage from passerby.

In support of his argument that the ground stood upon is protected as curtilage due to the fact that it was private ground in which no invitation was extended to the officer, Defendant relies upon Lorenza, et al. v. Superior Court, 9 Cal. 3d. 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973). In that case an officer approached a single family home and left the sidewalk approaching the home to look through a window that was not accessible through normal routes. The appellate court held that such an observation was unreasonable and violated the defendant's constitutional rights.

The Lorenza case is, however, distinguishable from the instant case. The instant case does not involve a single family home on private land. The apartment in this case was surrounded by property used by the entire apartment complex. Exhibits 8, 9, 15, 16 and 17 show a bicycle leaned up next to the apartment window of the apartment in question. Someone had to have left the sidewalk to put the bicycle there. There was also testimony that the complex housed families and it was common to see children and others leave the sidewalk areas and walk freely on the grassy areas of the complex. There does not appear to be any posted signs informing apartment residents or there guests to stay off the grass. And although bushes are planted at an angle off the sidewalk in front of one of the apartment's windows, there was no evidence presented that the bushes were planted for privacy reasons and not for aesthetic reasons.

Though Minnesota has no rule which deals with the specific facts of the instant case, the supreme court in State v. Buchwald, 196 N.W.2d 445 (Minn. 1972), acknowledged the reduced expectation of privacy over areas adjacent to motel rooms. "Granted that a [motel] tenant has standing to protect the room he occupies, there is nevertheless an element of public or shared property in motel surroundings that is

entirely lacking in the enjoyment of one's home." Id. at 448. Once it is determined that the area adjacent to an apartment window is not private but is common grounds for the entire complex, Buchwald would suggest that such an area would lose any constitutional protection. As the exhibits show, residents did walk upon and use the grassy area in front of Ms. Thompson's window. This evidence demonstrates that the area was common ground for the complex and therefore is not within the curtilage of the apartment Defendant occupied. As such, Defendant had no expectation of privacy in this area and the officer's observations did not constitute a search.

III. STOP OF DEFENDANT'S VEHICLE

After observing the incident inside the apartment, Officer Thielen called Officer Kallestad of the South Metro Drug Task Force for instructions. Officer Kallestad advised Officer Thielen to observe the individuals in the apartment and to stop the individuals if they attempted to leave the area. After a period of time, Officer Thielen and other Eagan police officers observed the Defendant and another male leaving the apartment with a black zippered bag. These two individuals got into the vehicle which was described earlier by the confidential informant and drove away. Eagan police subsequently stopped the vehicle, later identified as owned by Defendant, and told the two individuals to get out of the vehicle. Upon opening the passenger side door to allow the passenger to exit the vehicle, the police saw in plain view the black zippered bag and a handgun. Defendant and the other male were then placed under arrest. Defendant contends the stop of the vehicle was in violation of his constitutional rights.

In interpreting the state constitution the Minnesota Supreme Court in Matter of Welfare of E.D.J., 502 N.W.2d 779 (1993), held that when determining whether an investigatory "seizure" of the defendant occurred by the police

the test is if the court can determine objectively, on the basis of the totality of the circumstances whether a reasonable person having the defendant's perspective would have concluded he was not free to leave. E.D.J., 502 N.W.2d at 780. If a seizure is determined to have occurred by the court then the question becomes whether the police articulated a sufficient basis for suspecting the particular person stopped of criminal activity. Id. at 783. "The suspicion that the officer must be able to articulate must be more than an unarticulated 'hunch,' the officer must be able to point to something that objectively supports his position." State v. Johnson, 444 N.W.2d 824, 825-26 (Minn. 1989).

In the instant case, the actions by the police created the seizure of Defendant as they stopped the vehicle with flashing lights and approached the automobile slowly with guns drawn. Based upon the earlier observations of Officer Thielen as well as the vehicle description given to Officer Thielen by the anonymous person, the police have articulated a sufficient basis for the stop. Officer Thielen observed two individuals leaving the apartment building and identified them as the same two males in the apartment bagging white powder. The officer knew the vehicle had Illinois plates and could leave the area permanently. He testified that his training had also told him that automobiles are highly common in the transportation of narcotics. He could have reasonably concluded that these two individuals knew something about the activity involving the white powder in the apartment complex and possibly were in possession of some or all of this powder while in the vehicle. He could reasonably suspect that the white powder was contraband in view of how it was being handled in Ms. Thompson's apartment. He therefore formed an articulable basis to believe these two men were involved in criminal activity.

IV. STATEMENTS IN THE SUPPORTING AFFIDAVITS

Defendant contends that police officers recklessly included false statements in the supporting affidavits relied upon by the Hon. George Hoey who issued the search warrants in the instant case. Therefore he argues the evidence seized pursuant to the warrants should be excluded from evidence. The burden of proof in establishing the existence of false statements or misrepresentations is on the Defendant to override the "presumption of validity with respect to affidavit(s) supporting search warrant(s)" and demonstrate that the statement is false. Franks v. Delaware, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L.Ed.2d 667, -- (1978). The determination has already been made that Defendant lacks standing to challenge of Officer Thielen's initial observations into Kimberly Thompson's apartment. Defendant, therefore, lacks the standing to challenge the issuance of the search warrant for Kimberly Thompson's apartment. He does have standing to challenge the search warrant that was issued for his vehicle.

In State v. Causey, 257 N.W.2d 288, 291 (Minn. 1977), the supreme court adopted a two-prong test to determine whether the particular statements used in an affidavit are of such a nature as to invalidate a search warrant: (1) whether the misstatement of fact in the affidavit is material to the determination of probable cause; and, (2) if the misstatement is material, it must be determined whether the police officer or other agent deliberately or recklessly misrepresented the fact. Causey, 257 N.W.2d at 292-93. Innocent misrepresentation, even though material to the determination of probable cause, is insufficient to invalidate a warrant. Id. at 291.

In the instant case, Defendant asserts that Officer Kallestad in his affidavit in support of the application for the issuance of search warrants misled the judge by implying that

an ongoing investigation occurred regarding drug activity in the apartment complex. Specifically, the affidavit states that "during May of 1994," Officer Thielen was contacted by a confidential informant regarding drug activities at the complex. See Exhibit 1. The burden is on Defendant to show this statement is deliberately false. No additional evidence was presented by Defendant other than the statement contradicts with the later statement in the affidavit describing Officer Thielen's observations occurring on May 15, 1994, thereby implying that an investigation was ongoing. Additionally, though the statement can be construed as misleading, the statement cannot be said to form the basis of probable cause for these search warrants. The material determination of probable cause is based upon Officer Thielen's observations of the apartment and not the statement that could appear to state that "an investigation was ongoing. " Even if the Court were to determine the statement was misleading, it is not a material misstatement to the determination of probable cause because probable cause for the issuance of a warrant was established solely by Officer Thielen's own observations into the apartment and other information he received from his confidential informant. Defendant's argument fails the two-prong Causey test.

Defendant also cites the statement in Officer Kallestad's affidavit that the apartment was kept under constant surveillance after Officer Thielen's initial observations as deliberately false and misleading. Again, Defendant fails to meet his burden under the Causey test. Defendant fails to show by additional proof that Officer Kallestad's statement was deliberately misleading. Also, the statement was not determinative of being material in forming probable cause. Although Officer Thielen left the scene for 90 minutes to call Officer Kallestad, this statement is not material to forming probable cause. Officer Thielen's observations themselves are the material portion of the affidavit.

V. AFFIDAVITS AND ISSUE OF PROBABLE CAUSE

Defendant lastly contends that the search warrants were issued without sufficient probable cause and are therefore invalid.

The Fourth Amendment of the United States Constitution as well as article I section 10 of the Minnesota Constitution prohibits searches and seizures of people and places without probable cause. For a warrant to issue, a neutral magistrate or judge must find, within the warrant application and supporting affidavits, probable cause to believe that certain property was involved in a crime or possession of the property is a crime. See Minn. Stat. § 626.07. The test for probable cause is met if the affidavits, interpreted in a reasonable manner under the totality of the circumstances, sets forth competent evidence leading a reasonable, prudent person to believe that there is a basis for the search or articles sought are located in a certain area.

When a Court reviews the sufficiency of probable cause on a search warrant affidavit, a balance must be struck between an individual's Fourth Amendment right and the need for some leeway in law enforcement for society's protection. Brinegar v. U.S., 338 U.S. 160, 176, 69 S. Ct. 1302, 1311, -- L.Ed.2d -- (1949). In Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983), the Supreme Court created the standard of review in determining the sufficiency of search warrant affidavits: "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238, 103 S. Ct. at 2332. Among factors to consider by the Court are "type of crime, nature of items sought, extent of a suspects opportunity for concealment and normal inferences as to where suspects would keep items." State v. Pierce, 358

N.W.2d 672, 673 (Minn. 1984). When reviewing an issuance of a search warrant, the Court should give deference to the probable cause determination of the issuing judge and reverse only where no substantial basis for probable cause can be found. Massachusetts v. Upton, 466 U.S. 727, 104 S. Ct. 2085, 80 L.Ed.2d 721 (1984).

The supporting affidavits in the instant case is based upon sufficient facts to enable an independent judge to determine probable cause existed. This is done primarily through Officer Thielen's observations through the apartment window whereby he saw individuals bagging a white powder. Based upon his training and experience, he was able to conclude that such activity is consistent with drug packaging. Therefore, a review of the entire affidavit creates a "fair probability" that contraband or evidence of a crime will be found in a particular place.

R.F.C.

STATE OF MINNESOTA		DISTRICT COURT
COUNTY OF DAKOTA		FIRST JUDICIAL DISTRICT
State of Minnesota,	¦	
Plaintiff,	¦	File No. K9-94-985
vs.	¦	
Wayne Thomas Carter,	¦	OMNIBUS HEARING
Defendant.	¦	Volume 1 of 2
State of Minnesota,	¦	
Plaintiff,	¦	File No. K3-94-982
vs.	¦	
Melvin NMN Johns,	¦	OMNIBUS HEARING
Defendant.	¦	Volume 1 of 2

The above-entitled matters came on for hearing before the Honorable Robert F. Carolan, one of the Judges of the District Court, on the 21st day of September, 1994, at the Dakota County Judicial Center, City of Hastings, County of Dakota and State of Minnesota.

APPEARANCES:

PHILLIP D. PROKOPOWICZ, ESQ., Assistant Dakota County Attorney, Dakota County Judicial Center, 1560 West Highway 55, Hastings, Minnesota 55033, appeared on behalf of the state, and:

BRUCE COWAN, ESQ., 5865 North Lincoln Avenue, Chicago, Illinois 60659, appeared on behalf of the defendants, and:

DAVID L. HOLMAN, ESQ., International Village Office Arcade Building, 220 West 98th Street, Bloomington, Minnesota 55420, appeared on behalf of the defendants.

* * *

MR. PROKOPOWICZ: State is ready to Proceed.

Just for the record, it's the state's understanding, regarding the issues to be raised at this particular hearing, would be the search and seizure of defendant Kimberly Thompson's apartment on or about May 16th -- actually, 15th and into the 16th of 1994, as well as a stop of a motor vehicle which was being driven by defendant Johns and defendant Carter on or about May 15th, May 16th of 1994, and the probable cause surrounding those particular stops. As a result, we did give notice to defense counsel of some additional statements that were taken from some of his clients: those are not in issue.

It's basically the legitimacy of the stop, search and, naturally, if the arrest was bad then the state would agree the statements would fall by the wayside, as well as the physical evidence obtained in this particular case.

* * *

KEVIN KALLESTAD,

was called as a witness and, having been first duly sworn, was examined and testified as follows:

THE CLERK: For the record, would you state your full name, spelling your last?

THE WITNESS: My name is Kevin Kallestad. That's K-a-l-l-e-s-t-a-d.

* * *

DIRECT EXAMINATION

BY MR. PROKOPOWICZ:

Q. Mr. Kallestad, can you begin by telling the court what you do for a living?

A. I am a licensed police officer in the State of Minnesota.

Q. How long have you been a licensed police officer, approximately?

A. Approximately 15 years.

Q. And what is your current department that you work for?

A. I am currently working for the Metropolitan Transit Police.

Q. And how long have you been with that particular department, approximately?

A. Approximately two months.

Q. And prior to that who did you work for?

A. I worked for the City of Apple Valley Police Department prior to that, for the last 14 and a half years.

Q. And what was your most recent assignment with the Apple Valley Police Department?

A. For the past couple years I've been assigned as the agent in charge of the South Metro Drug Task Force.

* * *

Q. Were you working, then, in your capacity with South Metro Drug Task Force on May 15th of 1984?

A. Yes, I was.

Q. Excuse me, 1994. Excuse me.

A. Yes, that's correct, I was.

Q. And on 1994, on May 15th, did you begin an investigation into potential drug trafficing involving a Melvin Johns, Kimberly Thompson and a Wayne Carter?

A. Yes, sir, I did.

Q. And can you briefly tell the court how you first came upon this case?

A. Actually, it was on my day off. I was contacted at my residence at about 9:40 p.m. that the Eagan officers had

been involved in some preliminary investigation involving some suspected drug transactions.

Q. And specifically, what officer had advised you of that?

A. I spoke with Eagan Police Officer Jim Thielen.

Q. And what information did you receive from Officer Thielen at that time?

A. Officer Thielen told me that he had been approached by an informant who had indicated that there was some type of illegal drug activity occurring over in an apartment building in Eagan. Officer Thielen stated to me that he then, when he received this information, went over to check on the information and saw for himself what he believed to be cocaine being packaged within this apartment building.

Q. Did officer Thielen advise you of how he saw this particular cocaine operation?

A. Yes. He told me that he was standing in the common area, on the lawn of the property, or the apartment building, and looked through the window into the interior of the apartment.

Q. When you indicate that Officer Thielen saw this cocaine operation, did he go into specifics at all as far as what he had seen?

A. Yes, he did. When I spoke with him on the telephone, he told me that he saw small quantities of white, what he believed to be cocaine, being packaged in plastic Baggies and that the Baggies were being cut and tied after the

portions of this white substance was being wrapped up in the Baggie.

Q. Based on your training and experience, is that consistent with the way cocaine is normally packaged?

A. Yes, specifically crack cocaine.

Q. What other information did Officer Thielen provide you regarding what he had found out?

A. He told me that he had witnessed three individuals, two males and a female, involved in this packaging process. He also told me that he received information that a blue 1985 Cadillac parked in the parking lot of the apartment complex may belong to the individuals within the apartment.

Q. Do you recall anything else at all he told you?

A. No, sir, not at this time.

Q. Upon receipt of that information, then, what was your response?

A. I advised him that I would come in to write up a search warrant based on the information he had provided to me for the vehicle and for the apartment unit where he had witnessed this occurring. I also advised him that should the occupants of the apartment leave in the vehicle as described, that that vehicle should be stopped upon leaving.

Q. What did you do next, Officer?

A. I responded to the South Metro Drug Task Force office in order to start the preparation of the search warrants

* * *

Q. And you took some photographs?

A. That's correct.

Q. Take any pictures of the vertical blinds?

A. No, sir, I did not.

Q. Well, doesn't the whole case rest upon whether or not you could see through those blinds?

MR. PROKOPOWICZ: Objection. Argumentative. Relevancy, what the whole case rests on with this particular witness.

THE COURT: Sustained.

Q. Well, you took pictures of other parts of the apartment, correct?

A. Yes, that's correct.

Q. And you didn't take any pictures of the blinds that night which depicted the way they were that night?

A. That's correct.

REDIRECT EXAMINATION

By MR. PROKOPOWICZ:

* * *

Q. Now, you indicated -- or, during the course of the search of the apartment did you also recover a lease agreement?

A. Yes, I did.

Q. And was it for that particular apartment?

A. Yes, sir, it was.

Q. And based upon that lease agreement, who was the person assigned to that particular apartment?

A. The defendant, the female defendant.

Q. That would be Kimberly Thompson?

A. That's correct.

Q. On the search warrant application and the search warrant itself for the particular apartment you indicated -- or, you're also seeking permission to look for papers, invoices, billings, letters, credit cards and other items of identification that would indicate the owner, renter, occupant of the premise or the motor vehicle, ownership or constructive possession of any of the items described above. On your search of the apartment did you in fact do that?

A. Yes, I did.

Q. And outside of that lease agreement did you receive any other of the items I just described for you to indicate who may own or rent that particular apartment?

A. No. That was the only item.

Q. Did you discover during the course of your search of the apartment any pieces of evidence that would indicate that anyone other than Kimberly Thompson resided in that particular apartment?

A. No, I did not.

Q. When I say other items I mean clothing, other, personal effects, shaving kits, things like that?

A. No. Anything we found there indicated that Kimberly Thompson was the sole person that owned the apartment.

Q. And referring you to Exhibit 62A, which is the inventory, in particular, item No. 18, does it indicate what item No. 18 is?

A. Yes, it does.

Q. What is that?

A. That's the powder residue that was suspected of being cocaine that was collected from the surface of the kitchen table.

Q. So you did in fact collect it, bag it and itemize it, is that correct?

A. Yes, I did, sir.

Q. On cross-examination you also discussed some conversations that you had with Mr. Johns, is that correct?

A. That's correct.

Q. And during those conversations did Mr. Johns tell you where he was coming from, where he had been or where he was going to?

A. Yes.

* * *

BY MR. PROKOPOWICZ:

Q. Officer Kallestad, as part of this investigation were you able to make a determination as to the residence of defendant Carter and defendant Johns?

A. Yes. I was.

Q. And how was that determination made?

* * *

A. By viewing their identification cards and by them telling me where they lived.

Q. And the identification cards, were they from -- taken from their person, or how was that recovered?

A. The identification cards for Mr. Johns were taken from inside a zippered pouch on the floor of the car and contained his photo. And Mr. Carter's identification, I can't remember where that was obtained from, but at the time of his arrest it was obtained.

Q. But it did have Carter's name on it and clearly identified it as belong to him?

A. That's correct.

* * *

Q. Officer, based upon your reviewing, then, of the identificationcards of defendant Johns, first of all, where was his place of residence, what city?

A. It was in the state of Illinois.

Q. Do you recall specifically what city?

A. May I refer to my report?

Q. Sure.

MR. COWAN: Without raising the ire of the court, I don't understand the relevance. This goes to the possession, these questions? Because it's been stipulated that Miss Thompson was the lessee of the apartment. And I believe that Johns and Carter, under Olson, would fit into invitees. So if it's standing, I would like to state, too, you know, let the court

know where it's going with these questions because other than that, they're really not relevant to the motion.

THE COURT: I didn't recall than it had been stipulated that Miss Thompson was the sole legal occupant of the apartment here. If it's stipulated that she's the sole legal occupant and no one else had the right, by ownership or lease or any other legal authority, to occupy the apartment, maybe your relevance objection has more meaning. I didn't understand that that stipulation had been made, other than there was a stipulation that she had possession of the apartment as the lessee. But nothing said exclusively hers, that I know of.

MR. COWAN: Our stipulation is she's the exclusive leaseholder. And our position is that under Olson, which is a Minnesota case which has gone to the Supreme Court, that Carter and Johns are invitees and share the same standing as invitees of Miss Thompson in that apartment, and that they are there with her. And we know that because of what the police tell us, you know, that Carter and Johns were there. But our stipulation was that she was the exclusive leaseholder.

* * *

BY MR. PROKOPOWICZ:

Q. Based on your investigation involving the investigations of the matters we've discussed, what was the residence of defendant Carter?

A. That was in Chicago, Illinois.

Q. And likewise, regarding the defendant Johns, based upon your review of identification cards and such, what was your determination as to the residence of defendant Johns?

A. He also lived in Chicago, Illinois.

* * *

MR. PROKOPOWICZ: Call Officer Thielen next, Your Honor.

THE COURT: Step over here and be sworn, sir,

JIM THIELEN,

was called as a witness and, having been first duly sworn, was examined and testified as follows:

THE CLERK: For the record, would you state your full name, spelling your last?

THE WITNESS: Jim Thielen, T-h-i-e-l-e-n.

* * *

DIRECT EXAMINATION

BY MR. PROKOPOWICZ:

Q. Officer Thielen, can you begin by telling the court what you do for a living?

A. I'm a licensed police officer for the City of Eagan.

Q. And how long have you been a licensed police officer, approximately?

A. Seven years.

Q. And how long with the City of Eagan?

A. Seven years.

Q. And what is your current assignment with the Eagan Police Department?

A. I'm a patrol officer.

Q. How long have you been a patrol officer, approximately?

A. Seven years.

Q. Were you working in that capacity back on May 15th of 1994?

A. Yes, I was,

Q. And during the evening hours of May 15th of 1994 did you come into contact with an individual regarding some drug activity?

A. Yes, I did.

Q. Can you tell the court approximately what time of the day that was?

A. It would have been about 19:30 hours, 7:30 p.m., in that area.

Q. And do you recall whether it was light or dark out at that time?

A. I believe it was just starting to get dark at that time.

Q. And where were you located when you received this information?

A. I was located at Fire Station One on Rahn Road.

Q. What were you doing at that location at that time?

A. At that time I was running stationary radar.

Q. Was anybody with you at that time?

A. No.

Q. Can you briefly describe for the court what happened at that point?

A. I'm running stationary radar, individual pulls up in a vehicle, gets out, approaches my pass -- or, excuse me, my driver's side and tells me that he feels there's drug activity going on in the apartment complex across the street.

Q. Prior to that had you ever seen this individual before?

A. No.

Q. Did you know his name or reputation or anything before?

A. Nothing at all.

Q. How long did this conversation last with this particular individual?

A. We probably talked anywhere from 15 to 25 minutes.

Q. And what specifics did he tell you regarding the drug activity?

A. He told me that at 3943 South Valley View, Apartment 103, he believed there was drug activity going on. And he noticed through the window from outside that there were people sitting around a table and there was a white powder which he believed to be narcotics on the table.

Q. Did he indicate to you how he saw it from the outside?

A. No.

Q. Did he indicate to you what he actually saw besides just white powder?

A. The individuals, he said, were bagging it up, bagging the white powder up.

Q. What other information did he provide you, Officer?

A. He also told me, a little bit later, that there's a vehicle that possibly belonged to the individuals in the apartment.

Q. And did he describe that vehicle to you?

A. He told me it was a four-door blue Cadillac with Illinois plates, and he gave me the license plate number.

Q. Did you subsequently locate that vehicle in the parking lot?

A. Later on I did, yes.

Q. Can you describe for the court where you were located in relationship to where the supposed drug activity was going on?

A. Where -- When he first told me?

Q. Where this fire station is, when he was relating where the drug activity was going on.

A. Okay. Rahn Road runs basically north and south and I was on -- at Fire Station One, which is right on Rahn Road. The apartment complex is directly across Rahn Road, on the west side of the road.

Q. Is there an entrance and an exit to that particular apartment complex?

A. There's only two entrances and exits.

Q. Where were you in relationship to those exits?

A. It would have -- I was on -- It would have been directly across from South Valley View, which is one of the entrances that goes into the complex.

Q. In relationship to the other exit, did you see that at all? Could you see that?

A. I could not see it from where I was at, no.

Q. Could you see the vehicle at all from where you were located?

A. No.

Q. Did the -- this individual discuss with you whether or not he observed any weapons, or were there any weapons involved at all?

A. He did not discuss at that time, no.

Q. You indicated at that time. Did he later discuss that with you?

A. Yes, he did.

Q. When did that occur?

A. That was after -- after I went up to the apartment, saw what I saw and came back. So it was probably half-hour, 40 minutes later.

Q. You indicated you went to the apartment then?

A. After the initial contact. After I talked to him for 20 minutes or so I told him to wait where I was -- or, where he was and pull his car behind the building, and I told him I'll be back. I was going to go check on the apartment that he was referring to.

Q At this point in time, when you decided to check on the apartment, was it light or dark out?

A. It was dark. It was getting dark at that time.

Q. This would have been approximately around eightish?

A. Somewhere in there, probably a little later even.

Q. And can you describe for the court how you approached the apartment?

A. I drove down South Valley View and I parked at the 5357 building, which is another building. It's not joined together, but it's down further. I parked there and I walked up to the building, to the complex he described, the 43 building. And I came from the west and walked east, up towards the window.

Q. And why did you walk up towards the window?

A. He told me it was a ground -- Well, I know the complex and I knew which window he was referring to, as far as where the apartment was. So I knew it was a ground window.

Q. And what happened, then, when you approached the window?

A. I got up to the correct window, which was Apartment 103, and I stood outside. And they had blinds, these venetian blinds. I don't know what they're called. They're horizontal across. Those were pulled, but I was

able to see through those blinds standing outside on the yard.

Q. Do you recall whether or not the lights were on or off inside the apartment?

A. There was, what I could see, there was one light on that I could see in the kitchen, above the table.

Q. And when you were looking through the window, approximately how far away were you from the window?

A. It varied. I could be anywhere from a foot to 18 inches.

Q. Did you have to put your hands on the window to peer in at all, or could you just stand there and look and observe what was going on from that distance?

A. I could just stand there and look. I did not have to use a flashlight or put my hands along the window.

Q. And approximately how long did you stand there and observe?

A. Approximately 15 minutes.

Q. Can you tell the court what you observed?

A. Sure. As I was looking through, there were three black individuals sitting at a kitchen table, it was a glass kitchen table and the chandelier light was on above the table. The female was on the far right-hand side, one black male that had very short -- well, I thought he was bald at the time, and had a gray T-shirt, I believe, had his

back towards me, he was in the middle. And the third individual was to his left. He had on reddish bedroom slippers, a gold bracelet. He had a black, I believe it was a baseball cap at the time, on.

What I observed them doing was the middle individual that was, I thought, bald at the time, had a white powdery substance, which I believed to be narcotics, in front of him on the table. He would slide from his right to left this powder, it's small, small amounts of powder, over to the individual to his left, that we'll say had the slippers on. And that individual would take -- I thought it was a credit card or driver's license, a hard plastic card, scrape it to the end of the table, he had plastic sandwich bags, dump them into the plastic sandwich bag, role it up, hand it to the female party across the table. She would snip the ends off the bag and then put it in a pile.

Q. And did you observe this continuously while you were standing there or did they take breaks at all during your observation, or what happened?

A. I was there approximately 15 minutes and they didn't take a break. They worked slow -- I guess slow, I don't know, and saw them do about five, six times.

Q. Were they talking at all?

A. They were talking.

Q. Could you hear anything from outside the window as far as what they were saying?

A. No.

Q. What happened next, then, Officer?

A. After that I went back to my squad and went back to Fire Station One.

Q. Had you located that vehicle by this time that the individual had advised you they may be using?

A. Not at that time, no, I did not.

Q. What happened, then, when you got back to the fire station?

A. I met again with the informant. At this time Sergeant Johnson, my sergeant showed up and I advised him what I had seen and explained to him what happened -- the process of events that took place up to that point.

Q. Did you engage in further discussions at that time with the informant or the individual that had discussed this with you earlier?

A. Yes, I did.

Q. What additional information did you learn as a result of this second conversation?

A. Okay. At this time -- or, first what I did is we talked about the car again. I also -- he also discussed that these parties may be carrying a handgun. And I told them to wait here and I went back to the apartment the same way; drove the squad over there, parked it and I went looking for the vehicle that he described.

Q. And by -- From the time that you returned tack to the fire station, talked with the informant and met with Sergeant Johnson, how much time had gone by, approximately?

A. Okay. So the time -- So after I went -- Repeat it one more time. Which point?

Q. You indicated earlier you talked with the informant for a half-hour, 40 minutes?

A. The first time, right.

Q. You went to the window, waited there another 10, 15 minutes?

A. Correct.

Q. Then you met with Sergeant Johnson and the informant for a period of time. How long was that meeting, approximately?

A. That probably lasted another 15, 20, 25 minutes that we discussed our options.

Q. Then you indicated you went back to the apartment complex to look for the vehicle, is that correct?

A. Yes.

Q. And did you find the vehicle?

A. Yes, I did,

Q. Where was the vehicle located?

A. Where the informant stated. It was parked in front of the 3943 building. And it was parked there facing the building. And it was a large blue, four-door Cadillac with Illinois plates on it. And he also gave me the license plate number. It was a correct number.

Q. And how long did this take, approximately?

A. Ten, 15 minutes.

Q. Then what did you do?

A. I went back to the fire station and told the sergeant that I found the vehicle. At that point we discussed calling the South Metro Drug Task Force to let them know what we -- what we found.

Q. And did you in fact do that?

A. Yes, we did.

Q. And what specifically did you do?

A. There was a little -- We discussed, first, who we were going to call because we're not sure who's on call, and so we start at the top of the list. Sergeant Johnson -- We discussed calling out Kevin, since he was at that time in charge of the team. I got ahold of dispatch to find out if they leave town, if they have a number who we're supposed to call at first. They told me try Dan Gilbertson first, a member of the team. I think he was second in charge at the time, I'm not sure.

Q. Did you in fact attempt to contact Officer Gilbertson?

A. Yes. They gave me his pager number and I paged him.

Q. I assume eventually he did call back?

A. Yes, he did.

Q. Okay. And what was his response or what did you discuss?

A. I just basically told him brief synopsis of what we had. He said that he could not come out--he had been drinking at the time--so try Kevin Kallestad.

Q. Did you in fact do that?

A. Yes. I believe Sergeant Johnson finally made contact with him.

Q. And approximately how long did this take, this scenario back and forth through dispatch and pagers and all that?

A. Probably 15 minutes or so.

Q. Did you in fact have conversations, then, with Officer Kallestad?

A. Yes, I did.

Q. And who was present besides yourself -- First of all, how are those conversations conducted? Directly, phone, or how?

A. It was by phone.

Q. And you are still at the fire station at that time?

A. Yes.

Q. And who else is present with you at that time?

A. Just the informant.

Q. And where was Sergeant Johnson?

A. He went -- I told him to go over to North valley View and watch that location in case the vehicle left. I could see where I was, South Valley View.

Q. Did you advise Officer Kallestad of the information you received from the informant?

A. Yes, I did.

Q. Did you advise Officer Kallestad of your personal observations?

A. Yes.

Q. Including what you discovered when you went to the window?

A. Yes.

Q. And what was Officer Kallestad's response?

A. He informed me that if the vehicle leaves, to stop and secure the vehicle.

Q. Did he tell you whether to search the vehicle or not?

A. No. Stop, secure it.

Q. Did he indicate to you what he was planning to do with the vehicle or the occupants?

A. What he was going to do -- because it took him a while to get up there, he told me that he would draft up a search warrant for the vehicle.

Q. What happened next?

A. At that point we basically waited until the car finally -- until the car finally moved.

Q You say the car, you mean the suspect car with the Illinois plates?

A. Yes, the suspect vehicle.

Q. What happened at that time?

A. At that time Officer Johnson informed me that he observed two males put a bag into the car, a couple bags into the car, and they were ready to leave, so I got in my car. And I was parked on the south side of Fire Station One waiting for them to come out. Officer Johnson then told me that they were coming down South Valley View, at which time I spotted them as they were coming out to South Valley View and Rahn Road.

Q. What did you do then?

A. At that time I pulled up behind him, waited for another squad to arrive, and I activated my emergency lights at the intersection of Dick -- correction, Rahn and Beau de Rue Drive.

Q. What happened then?

A. Vehicle pulled over. Pulled off to the right, pulled over. I got out of my car, walked up with my gun out. Officer Johnson and Officer Nelson at the time were there, walked up on the passenger's side, with their guns out also. I got up to the driver's side, I ordered them to put their hands -- both of them, and the passenger on the dash, which they did. And I told the driver to turn the car off and step out of the car.

Q. Did you recognize those individuals at that time?

A. Yes, I did.

Q. Who did you recognized them as?

A. I recognized the driver as the middle person in the apartment complex.

Q. That you had seen possibly doing the drug activity?

A. Correct.

Q. Did you recognize the other occupant of the vehicle?

A. Yes, I did. I recognized him as being the male party on the left side that was bagging the white substance.

Q. You indicated you and the other officers had your guns drawn. Why did you have your gun drawn?

A. Any time I deal with drug activity, that I believe to be drug activity, I know that there's a gun, involved -- or, there's a high probability that a gun will be involved, I'll have my gun out.

Q. As you approached the vehicle, then, with your guns drawn, what happened?

A. Tell them put their hands on the dash, turn off the car. Driver steps out, get him back, the rear of the car. The passenger was still held at gunpoint. I believe it was Officer Nelson, Sergeant Nelson then searched the driver, handcuffed him and I believe they put him in Officer Nelson's squad.

Q. What happened then?

A. I went around to where my partner Officer Nelson was, we opened up the door, it was unlocked, the passenger door, the front --

Q. Why were you opening up the door?

A. We were going to get the passenger out of the car.

Q. Go on, Officer.

A. We told him to keep his hands where we could see them. He stepped out of the car. I recognized him as being the party in the apartment. He still had the gold bracelet on, he still had slippers on. And he stepped out, Officer Nelson then searched him and cuffed him. As he stepped out, I could see on the floor right between his legs a small, black leather, zippered type bag or purse and automatic pistol sitting down on the floor.

Q. What happened next?

A. I asked him at that time are there any -- do you have any drugs in the vehicle? And he said he had two ounces of coke, and he wouldn't tell me where.

Q. Was he subsequently taken into custody then, arrested?

A. Yes, he was. And I believe he was put in Officer Nelson's squad.

Q. At that point what did you do?

A. At that point we ordered a tow. Dispatch contacted Officer Kallestad, told him that we had them in custody. And the officers took the two subjects back to the police department.

* * *

Q. Do you know who the vehicle registered to?

A. No, I do not. Right now I do not.

Q. Would that be in the police report at all?

A. Could I check?

Q. Do you have those reports with you?

A. Yes, I do.

Q. To refresh your memory, please look at the reports and see if it's indicated.

A. (Pause.)

Q. Did you find it?

A. I believe so.

Q. Who did the vehicle register to?

A. Sam Dave -- Illinois, Sam Dave George - 896 comes back to a Carter, Wayne T., of 841 East 52nd Street, Chicago, Illinois. And it lists to a '85 Cadillac, four-door.

Q. That's the vehicle you stopped?

A. Yes.

MR. PROKOPOWICZ: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. PROKOPOWICZ:

Q. First of all, Officer, I'm showing you Exhibit No. 14, ask if you can take a look at that exhibit and tell the court what that is, if you recognize it?

A. Well, it's one of the -- I believe it's the 43 building of Valley View apartments.

Q. This is, basically, the building where you allegedly saw the drug activity occurring?

A. Correct.

Q. And is that a reasonably accurate depiction of the building, as far as the size of the building, the type of the building, the number of apartments and the parking lot and like as it was back on May 15th of 1994?

A. Yes.

Q. Officer, I'm next showing you what's been marked as Exhibit 15, ask if you can take a look at that. Do you recognize that particular photograph?

A. Yes, I do.

Q. What do you recognize that photograph of?

A. It's the 3943 building, where the respective drug activity was.

Q. Can you indicate for the court on that particular photograph, as you look at it, where the particular window was that you were observing?

A. As you would walk through the front door of the 43 building, it's the first set of windows to the left as you walk through the door.

Q. And on what level of the building?

A. It's ground level. The windows are ground level, the apartment is underground.

Q. Okay. Now, I notice next to the door there is a smaller window, is that correct?

A. Yes.

Q. Did you look in that window at all?

A. No.

Q. Okay. Then there's another set of larger windows. Are those the windows you're referring to?

A. A set of four windows, yes.

Q. Maybe it you can just display the photograph to the court, and if you can point to the court the window that we're talking about?

A. These are the set of windows. Here's the front door, set of windows. (Indicating.)

MR. COWAN: Do you think he could mark it? For the record, objection.

BY MR. PROKOPOWICZ:

Q. If you can just circle it for the court?

A. (Indicating.)

Q. Officer, showing you Exhibit 16, do you recognize that as well?

A. Yes, I do. Another picture of the building, the 3943 building.

Q. It's a different angle, basically. Shot from a different angle, is that correct?

A. Yes. It's the angle I came in from when I walked up to the building.

Q. You would be looking from the west, basically?

A. Yes.

Q. Is that a reasonable depiction, as far as the lawn, the bushes, the doors, the windows, as it appeared on May 15th of 1994?

A. Yes, it is.

Q. Again, it you could circle on that one the window we're talking about?

A. (Indicating.)

Q. Next, Officer, I'm showing you Exhibit 13, ask if you recognize that?

A. I'd say it's probably the window that I was looking through.

Q. Okay. Can you indicate on that particular photograph where you were standing? And again, if you can just put an X on the side of the window that you were standing on?

A. Okay. Why don't I put it right here.

MR. COWAN: Pardon me. What did the witness say?

THE WITNESS: I'm going to put the X -- I'm mumbling. It's going to be --

THE COURT: You need to speak up, Mr. Cowan and everybody here has the right to hear you, Officer.

THE WITNESS: I'm going to put it to the left of the windows.

MR. COWAN: Didn't you say: Why don't I put it here? Is that what you said?

THE WITNESS: No. I did not.

BY MR. PROKOPOWICZ:

Q. There's a brick portion of the window that kind of sticks out right next to the window, is that correct?

A. Yes.

* * *

Q. In relationship to that brick abutment that comes out on the left side of the window as you look at the photograph, where are you standing as far as which side of that brick abutment?

A. I would be standing -- we'll say in front of it. As it comes out, I was standing in front of it.

Q. On the window side of it?

A. There are different times. At which point? I was standing at -- I moved from the front of the brick and I also moved to the right side of the brick and directly in front of the window.

Q. That was during this ten-, 15-minute time span that you were looking in the window?

A. Yes.

Q. When you initially were standing, where were you initially standing?

A. I was initially standing, when I first peered in, was off to the left, in front of the brick abutment.

* * *

Q. Okay. Initially you indicated you were in front of the brick abutment. If you can point that out, please?

A. When I first came up there to the building I took a position--we'll mark it--I took a position up here. I was standing, I was covered by this brick abutment. Through the 15, ten, 15 minutes I was there I also moved off to this side to get a closer look through the shades or the blinds. (Indicating.)

Q. When you were standing in front of the brick abutment what did you see as far as activity inside the building?

A. At that time I could see the table, which would be -- the kitchen table up over here, with a light on above it, and the three individuals sitting around the table. (Indicating.)

Q. Could you see any of the transferring of this white powdery substance, the Baggie that you described earlier?

A. Yes.

Q. And then you moved a little closer to the window, I think you indicated, is that correct?

A. Correct. I don't know at what time it was, but I did take a step over towards this point --

MR. COWAN: Do you want to mark that?

THE WITNESS: Mark it?

BY MR. PROKOPOWICZ:

Q. Can you mark that with an X and maybe a letter B or something by it for your second position?

A. Okay. (Indicating.)

Q. If you can mark your first position an A?

A. (Indicating.)

Q. So you became directly more in front of the window at that point?

A. Yes.

Q. At that point you also observed the same activity going on?

A. Yes.

Q. Finally, Officer, I'm showing you Exhibit 17, which I believe we can stipulate to is a picture of the same window. Does that accurately depict the view that you would have had as you approached that particular window?

A. Yes, it would have.

Q. It also has blinds, as you can indicate, on that window. Is that the same type of blinds that were on there on the evening of May 15th, 1994?

A. If it's a metal type, it is.

Q. As far as the size, the width of the blind and everything else, does it appear to be the same?

A. As far as I recall right now, yes.

Q. The only difference is they were open, at least one or two of them were open, is that correct?

A. Correct.

Q. Do you recall which ones were open at all?

A. I -- I know we got a lot of pictures. I don't recall right offhand which portion of the blind was open that I could see through.

Q. Okay. Thank you.

* * *

Q. Now, as a police officer for several years with the Eagan Police Department have you had occasion, on routine patrol, to drive by that particular apartment complex and that particular apartment building?

A. Several times a night when I work.

Q. Now, outside in front of those windows that you've previously described to the court there's a lawn area, is that correct?

A. Yes.

Q. You've seen people interact on that lawn area, doing things, walking across it and the like?

A. All the time.

MR. PROKOPOWICZ: I have no further questions.

* * *

CROSS-EXAMINATION

BY MR. COWAN:

Q. Officer Thielen, am I addressing you correctly?

A. Yes.

Q. Officer Thielen, on May 15th, 1994, at 19:30 hours, which is 7:30, you say you were on Rahn Road?

A. Rahn Road, correct.

Q. Rahn Road. And you were running radar?

A. Correct.

Q. And you were approached at that time by a confidential informant?

A. Yes.

* * *

Q. Now, Officer, you say someone drove up at that time?

A. Yes.

Q. Now, in your report, I ask you, does your report mention that somebody drove up?

A. No.

Q. It says you were approached, does it not?

A. Yes.

Q. And it says you were approached by whom?

A. Confidential informant. By an individual who is a C.I., confidential informant.

Q. Could you read specifically what it said, who approached you?

A. I was approached by an individual, by a C.I., who is a confidential informant.

Q. That isn't what it says.

A. What does it say?

Q. It says you were approached by an individual who is my C.I.

* * *

Q. I would like to you read, if you will, "when I was approached."

A. "I was approached by an individual who is my C.I., confidential informant," period.

Q. You identify him as my C.I.?

A. Yes.

Q. So this is your confidential informant?

A. After I talked to him, yes, he was.

Q. You had a relationship with him prior to that date, did you not?

A. No, I did not.

Q. You never saw him prior to that date?

A. No idea who he was.

Q. There was no complaints about the building on Valley View, about drugs during the month of May? May.

A. Several complaints about that complex, yes.

Q. You had an ongoing investigation relative to that building, did you not?

A. No, I did not.

Q. Did you not tell Kevin Kallestad that during the month of May, several weeks, you had had complaints, specifically from your confidential informant, telling you about drug activity in that building, specifically Apartment 103 were Kimberly Thompson resided?

A. Not that I recall, no.

Q. So when you called him my C.I., instead of citizen or cooperating individual, there's no particular reason for that?

A. I did not want to use his name.

Q. But you could have called him a citizen, correct?

A. Sure, could have called him a citizen also.

Q. You could have called him a C.I., there is also cooperating individual, that protects his anonymity, right?

A. Okay. Yes.

Q. But you call him confidential informant?

A. Yes, I did.

Q. And you called him my confidential informant?

A. Yes.

Q. Now, this was 7:30?

A. Approximately 7:30.

Q. Okay. He drove up?

A. He drove up.

Q. Get out of his car?

A. Yes.

Q. And did he walk over to your car?

A. Yes, he did.

Q. Did he say something to you?

A. Yes, he did.

Q. What was that?

A. He talked to me about some --

Q. No. I asked you, what did he say?

A. I don't have it down verbatim. I can tell you in general what he said, but I do not know exactly what it was.

Q. Tell me it again, what he was.

A. That's what I said.

* * *

Q. He got out of his car?

A. Yes.

Q. He approached you?

A. Yes, he did.

Q. And he said something to you?

A. Yes.

Q. What did he say?

A. He advised me that there was drug activity going on at apartment -- the complex 3943, Apartment 103, South Valley View.

Q. His first statement to you, how long did that take?

A. I don't know.

Q. Can you give us your best guess?

A. His first statement when he approached the car?

Q. Um-hum, about the drug activity.

A. A few minutes.

Q. Okay. And what did you say to him?

A. Okay, then I started talking to him and asking him questions.

Q. What did you ask him?

A. Some stuff. I'm not going to reveal what I asked him, that would identify my confidential informant.

Q. I don't want you to identify him.

A. Okay.

Q. Did you ask him who he was?

A. Yes, I did.

Q. Did you ask him for identification?

A. Yes, I did.

Q. Okay. Did you ask him anything else?

A. Yes, I did.

Q. What did you ask him?

A. I asked him how he knows this.

Q. And did he tell you?

A. Yes, he did.

Q. What did he tell you?

A. He told me he went past the window and looked inside.

Q. What did you say to him then?

A. And I said -- that's what I asked. I asked: What did you see? And he told me he saw what appeared to be drug activity going on; there's individuals sitting around a table, there's white powder on the table that he believes to be narcotics.

Q. Didn't he tell you that initially?

A. After -- Through our conversation he told us that -- or, told me that.

Q. When he approached the car he told you that?

A. After I talk to him for a while, yes.

Q. How long did you -- How long was it before you learned from him fully what he had seen and how he had seen it?

A. I don't know.

Q. Would anything refresh your recollection?

A. Not right offhand, no. I don't know, we had a conversation, we talked. There was stuff that we talked about, and I don't know.

Q. Well, could it have been five minutes?

A. Probably longer.

Q. Could it have been ten minutes?

A. Sure.

Q. Okay. And after speaking with him you were at the fire station, were you not?

A. Yes, I was.

Q. And you were alone?

A. Yes.

Q. You then went over, after speaking with him, from the fire station, in your squad car, over to the address, is that correct?

A. Correct.

Q. Okay. Now, you got out of your squad car, correct?

A. At what point?

Q. When you arrived at the building -- May I see the photographs? When you arrived at 3943 South Valley view, where did you go?

A. I didn't park my car there.

Q. Okay. Where did you arrive -- drive?

A. At 5357 building, farther west.

Q. How far away?

A. Another complex that size.

Q. How far in distance?

A. Probably four, five hundred feet.

Q. And you walked four or five hundred feet?

A. Yes.

Q. How long did it take you to get from the fire station to where you parked your car?

A. Couple minutes.

Q. How long did it take you to walk from the building where you parked your car to 3943?

A. Probably about the same. Couple minutes.

Q. And now you're at 3943?

A. Correct.

Q. Okay. And now I'd ask you to look at this picture, Exhibit No. 33, and ask you if that's the outside of the building?

A. Yes, it is.

Q. Okay. And is it a fair statement to say that the front door has an address right above it?

A. Yes.

Q. And that --

* * *

Q. There's an address right above it?

A. Correct.

Q. And leading to the door where the address is, right before it is a sidewalk?

A. Yes.

Q. Access to the door?

A. Yes.

Q. Is there any access off this sidewalk leading to any of the garden apartments?

A. No.

Q. Okay. And is there a bush in front of the windows of 3943, garden apartment?

A. Yes.

Q. As a matter of fact, aren't there several bushes?

A. Well, they're back from the windows, yes.

Q. This one particularly is placed in front of 3943?

A. It's there, yes.

Q. In front of the windows. And it's about two feet away, isn't it?

A. I don't recall.

Q. Will anything refresh your recollection?

A. Could be two, could be four feet away. You can't tell from the picture how far it is away from the window.

Q. And the other side, across this yard area, this grassy area, there's trees planted and everything in there, right? Bushes?

A. There's shrubs and trees, yes.

Q. And right across from there there's another doorway, just like 3943? Right across over here there's another doorway for the other garden apartment, isn't that correct? (Indicating.)

A. 3947, yes.

* * *

Q. Okay. Now, you went over to that address now, is that correct?

A. Yes.

Q. And you left the sidewalk area?

A. I was never on the sidewalk area.

Q. You walk over -- There was a place to park cars there on the side, right by -- next to the doorway, isn't that correct?

A. There is -- Correct.

Q. And there's those yellow things that stop you from rolling over?

A. There is several of them, yes.

Q. So you walk over those?

A. No. I did not.

Q. How did you get to where you --

A. I stated earlier I came in from the west side, the 5357 building.

Q. So you came across the grass?

A. Correct.

Q. Now, there's a sidewalk leading to -- 3947, is it? It's the same building?

A. Correct.

Q. So there's two sidewalks that lead to the two front doors?

A. Yes.

Q. And there's no other access to any other doors in front of that building, isn't that correct?

A. Yes.

Q. Okay. So you left the access areas, that is, the two sidewalk areas, or you walked across one of them to get to the windows of 3943?

A. I walked across the 47 -- 3947 one.

Q. And you walked directly in front of the windows of 3943, correct?

A. I walked up to that window, yes.

Q. You walked up to the window. And you made this mark, did you not? (Indicating.)

A. Yes, I did.

Q. Okay. So here's -- for purposes of the -- of your identification, you put an A and a B?

A. Yes.

Q. Okay. Now, the B portion here you put right on the bricks?

A. I was asked to put a mark in the general area where I was.

Q. I know. I know.

A. Okay.

Q. And you out it right on the brick. The B is on the brick, is it not?

A. Only -- If I would have put it in the shaded part, you wouldn't have seen it, so I put it closer.

Q. So you weren't standing where the B is?

A. I was not standing exactly where the B was, no, sir.

Q. Were you close to the B?

A. I could have been close to the B, yes.

Q. You could have been close to the B?

A. The B was asked for me to put -- I was asked to put the B there, my second place I took a vantage point. So I put the B in a rough general area where I was. I could have been six inches either way. I could have been, you know, back further. That was where I put it.

Q. You were pretty close up to the window?

A. I was close to the window.

Q. Were you at any time six inches from the window, that is, your eyes?

A. I was not that close.

Q. Were you at any time less than a foot close to that window to peer to look in?

A. Possibly.

Q. And you see the -- I'll show you these pictures. See these shades?

A. Yes.

Q. Now, those shades were up, were they not? I mean, those shades were there, there were shades?

A. Yes, there were shades. Correct.

Q. Okay. And --

MR. PROKOPOWICZ: Your Honor, state would ask for clarification. We're talking blinds, not shades.

MR. COWAN: Pardon me.

BY MR. COWAN:

Q. There were these what you call vertical -- excuse me, horizontals, horizontal blinds, right? That means that there's individual laths that go down the blinds?

A. Yes.

Q. And they were on the window at that time?

A. Yes, they were.

Q. And you're saying they were open?

A. No, I'm not.

Q. What are you saying?

A. I'm saying part of one of them was open.

Q. Are you saying -- I'll show you what's been marked Exhibit No. 23, and are you saying that -- See this opening in between the two shades? (Indicating.)

A. Yes.

Q. Is that what you mean by open?

A. Part of -- Part of one of the shades was open, yes.

Q. You mean this opening? (Indicating.)

A. You could see through the shade.

Q. You mean by looking through the shades or the space or gap between them?

A. Looking through a gap in the shade.

Q. So the shades were closed but there was gaps between them?

A. There was an opening in between one of the shades.

Q. So the shades were closed?

A. I'll restate it. The shades were closed and there was an opening between one of the shades.

Q. A gap?

A. A gap, an opening, sure.

Q. I'll show you what's been marked Exhibit 25, it shows another gap. Probably the same type of gap. Is that what you're referring to?

A. Referring to --

Q. When you say you looked through, you're able to see through it because there was a gap where the shade doesn't come quite together?

A. I didn't say that's where I saw through the shades though. You're pointing out there's a gap there and I'm agreeing, yes, there is a gap there.

Q. Is that how you were able to see?

A. I'm not sure if I saw through the gap or if there was an opening right next to the gap. But there was a gap in the shades that I looked through.

Q. I'll show you -- this is taken real close. Here's a closer one, People's Exhibit 39. Are you saying that you were able to look through one of the laths here, or the gap that I'm telling you about?

A. It could have been one of the laths, it could have been the gap.

Q. You don't know which?

A. I don't recall right now, no, I do not.

Q. Now, you say that when you got there it was dark?

A. I believe it was dark at that time. Yes, it was.

Q. How dark?

A. It was dark. I mean, there's different darknesses.

Q. Right. Well, was it midnight dark?

A. Not if there was a full moon out.

Q. Well, there wasn't a full moon that night, as a matter of fact.

MR. PROKOPOWICZ: Objection, Your Honor.

THE COURT: Sustained.

BY MR. COWAN:

Q. Was it dark out like it gets when it's 11 o'clock at night?

A. Could have been.

Q. Okay. What time were you looking through the window? If the fellow approached you at 7:30 --

A. Um-hum.

Q. -- spoke with him for about ten minutes, you drove down, two minutes, walk back, two minutes, that's 14 minutes, and then walk across and walk up to the window. That's around 15 minutes, right? Give or take?

A. Sure.

Q. So you're there at about quarter to eight looking through the window, correct?

A. No.

Q. Where am I incorrect?

A. As I stated earlier, I spoke to the individual at the scene, when he first approached me, for about 15 to 20 minutes. We were discussing before I went over to the complex.

Q. I know you said that.

A. Okay.

Q. Okay. I won't argue. So it was dark enough that people had their lights on in the building?

A. Yes.

* * *

Q. Did you know, Officer, that the sun sets the same time of every day of every year of each year? In other words, if it sets at 8:35 p.m. of May 15th of 1994, that's the time it will set in 1995. And, consequently, each day when the sun sets at a specific time you can count on it the next year as setting at the same time and you can count on the same amount of twilight. Did you know that?

A. No.

* * *

Q. You observed for 15 minutes at the side of the window at 3043 Valley View?

A. Apartment 103, yes.

Q. And after 15 minutes you left?

A. Correct.

Q. And while you observed you were close enough to the window that you were able to see one of the people inside the apartment wearing red slippers, is that correct?

A. Yes.

Q. And after the 15 minutes you left and went back to the fire station?

A. Approximately 15 minutes, correct. Yes.

Q. Okay. And once at the -- Strike that.

When you went to look at 3943 you went alone, is that correct?

A. Yes.

Q. And when you went back to the fire station your confidential informant was still there?

A. Yes.

Q. And you stayed and spoke with him for anywhere from 15 to more minutes?

A. Correct.

Q. How much? Could it have been a half-hour?

A. It could have been, yes.

Q. Could it have been 40 minutes?

A. Possibly.

Q. Could it have been longer?

A. That would be pushing it.

Q. Okay. And after speaking with him for the 40 minutes, you then called Trent Johnson?

A. No, Sergeant Johnson arrived just after, a little bit after we talked to him. After I was talking to him, he stopped by Fire Station One.

Q. Just so I'm clear, you spoke to the confidential informant, parked your car, walked back, walked across the grass, went to the window, watched for 15 minutes, went back to the fire station where your confidential informant was. Was Trent Johnson there then?

A. Not right then, no.

Q. Not right then. You began to talk to your confidential informant for a period of up to 40 minutes or less. And during that time did you call Trent Johnson?

A. I don't recall if I called him or if he just showed up.

Q. Okay. Now, you spoke, now, with Trent Johnson about what to do, is that correct?

A. I explained what I had, yes.

Q. And how long did you talk with Trent -- Sergeant Trent Johnson?

A. Maybe five, ten minutes.

Q. And you and Sergeant Trent Johnson decided to do something, is that correct?

A. Correct.

Q. And that was to make a phone call, is that correct?

A. That was to make a couple phone calls, yes.

Q. And how long did these phone calls take, to make them?

A. There was several made. Could have been anywhere from 15 to 20 minutes, 25 minutes.

Q. You eventually got to speak with Kevin Kallestad?

A. Yes, I did.

Q. And how long did you speak with him on the phone?

A. Just a few minutes, from what I recall. I explained the situation to him. And could have been five, ten minutes, I don't recall. I talked to several people.

Q. And you got some advice from him?

A. Yes, I did.

Q. And I believe that was regarding a vehicle?

A. Yes.

Q. And you now left to go find the vehicle?

A. I went back to the apartment complex, yes.

Q. And then you found the vehicle?

A. I found the vehicle.

Q. And then how long did you stay there after finding the vehicle?

A. Just long enough to find the vehicle.

Q. And then you came back?

A. I came back.

Q. How long did that take?

A. I'd say five minutes.

Q. And now what did you do?

A. I got back after I found the vehicle. This time Sergeant Johnson went over to North Valley View to take a position ever there to watch the car.

Q. You sent Trent Johnson at this time back to watch the car?

A. Correct.

Q. And where was the car parked?

A. In the parking lot in front of the building.

Q. Okay. Now, are you familiar with the building of 3943?

A. Yes.

Q. Through 3947?

A. Both of them, yes.

Q. There's two front doors, are there not?

A. Correct.

Q. And there's access doors on another part of the building, is that correct?

A. That I don't recall, if there's an access door, no.

Q. A fire door in the rear?

A. I don't believe so.

Q. From the utility room?

A. You have to get at it through the inside.

Q. So there's no way out, other than these two doors?

A. As far as I recall, there's no other doors going in that building.

Q. And was this 50 minutes after the 15 minutes where you talk with your confidential informant, nobody was looking at 3943 Valley View Drive, Apartment 103, is that correct?

A. Okay, run that by me again. Which point?

Q. Well, you left for -- you observed for 15 minutes?

A. Observed who now?

Q. In the window.

A. Correct. Right.

Q. And then you went back to the fire station?

A. Correct.

Q. And you say you spoke with your confidential informant for around 40 minutes?

A. Possibly, yes.

Q. And then Trent -- Sergeant Trent Johnson showed up and you told him what you had?

A. Right.

Q. For about another ten minutes?

A. Yes.

Q. So for around 50 minutes?

A. Right.

Q. So for that 50 minutes no member of the police department was observing 3943 Valley View Drive, Apartment 103?

A. Correct.

Q. Now, you say that for another 25 minutes after that you're on the phone trying to find out what to do?

A. I've talked to dispatchers. You got to understand, that night was extremely busy.

Q. I understand.

A. And that's why there was nobody watching the building after I left. I was put on hold a couple times.

Q. I understand. Officer. I'm not --

A. It took a while, yes.

Q. So for another 25 minutes the building is unwatched and Apartment 103 is unwatched?

A. The apartment, yes.

Q. You finally, after getting through to several people, get to Kevin Kallestad, which in another approximately ten minutes?

A. Approximately, yes.

Q. And for that ten minutes no one is watching the building from the police department?

A. No.

Q. And you talked to Kevin Kallestad for about five minute or less?

A. Approximately, yes.

Q. For that five minutes no one is watching the building?

A. No.

Q. So for a period of about an hour and a half after your initial 15 minute observation no one is watching that building?

A. Not that I know of.

Q. Or that Apartment 103 or the occupants?

A. Not that I know of.

Q. Or the car?

A. Or the car.

Q. People could have come and gone?

A. Come and gone from where?

Q. People from the apartment could have left the apartment?

A. Yes, they could have.

Q. Without your knowledge?

A. Yes.

Q. They could have taken the white powdery substance that you suspected to be cocaine with them?

A. Yes, they could have.

Q. People came and bought it?

A. Yes.

Q. They could have got in the car with the cocaine, left and came back without your knowledge?

A. Yes, they could have.

Q. After this 90 minutes and your development of a plan with Commander Kallestad, you no longer know that the

cocaine or the powdery substance that you suspect to be cocaine is still in the apartment'

A. No, I do not.

Q. And you don't know if in fact the two individuals who eventually leave and get into the car leave with cocaine?

A. I do not, no.

Q. And when you stopped the car you didn't know that the car contained cocaine?

A. No, I did not.

Q. Or a gun?

A. No, I did not.

A. No, I did not.

* * *

Q. You're operating on what you had previously seen during that 15 minute period?

A. And the information I received from the informant.

Q. Right. Right. Right.

A. Correct.

* * *

Q. You didn't have a warrant signed by a judge to stop that car, did you?

A. No. I did not. I did not have a warrant, no.

Q. One had not been signed by a judge at that time?

A. Not that I know of, no.

Q. Now, you sent Trent Johnson to an area of the parking lot where the car was parked, is that correct?

A. He picked -- I don't know the exact position. He picked an area over in that area, yes.

Q. But your instructions were to watch that car?

A. Watch, yes, so that it would not leave.

Q. He reported back to you, did he not?

A. Yes, he did.

Q. And he reported back to you that at approximately 22:30 hours two black individuals came out of 3943 and got in that car?

A. Yes, he did.

Q. Okay. And they drove down Valley View?

A. South Valley View.

Q. South Valley View. And got on Rahn?

A. Rahn Road.

Q. Rahn Road. And went some distance on Rahn Road?

A. About a block.

Q. And you were stationed at the lip of Rahn and Valley -- South Valley View? You were near the fire station?

A. I was in the parking lot of the fire hall.

Q. So you saw them come by?

A. Yes. They came out of South Valley View.

Q. You went after them?

A. I went after the car, yes.

Q. And you stopped their car?

A. Yes, I did.

Q. So you would have stopped their car at around what time?

A. 22:36.

Q. That's when you had your gun out?

A. Yes.

Q. And you got one of the people out?

A. I got the driver -- I took the driver out first.

Q. And you went back -- By then another officer is on the street, Mason or Nelson?

A. There were approximately three to four officers. I didn't stop the car by myself, no.

Q. But you were the officer who discovered the gun as well?

A. Yes.

Q. Okay. And then they're placed under arrest?

A. Yes, they were.

Q. The car is towed?

A. The car was towed.

Q. And what happens next?

A. They're all -- They were brought up to the station. I followed the car as it was being towed up to the station, as it was being put in the garage. I went inside the cell area. At that time Kallestad arrived and we discussed what we were going to do. I then -- Kevin said let's see if they want to answer any questions. We took each one individually. I read them their rights and Kevin proceeded to interview them.

Q. What time was this?

A. It was probably about 23:10 or so, ten after 11.

Q. And what happened next?

A. After they were interviewed?

Q. Yes.

A. They were released to Dakota County sheriff's officers.

* * *

Q. Is that correct, Officer?

A. Okay. Are we talking about the blinds or the apartment?

Q. The blinds. You know, the pictures I showed you?

A. Okay.

Q. You said you were able to see through gaps?

A. Correct.

Q. Would those pictures be an accurate depiction of the way the blinds were on the night of this incident?

A. Possibly.

Q. Do you want to take a look?

A. (Pause.)

Q. That's inside. (Indicating.)

A. Is there a bedroom?

Q. I guess so.

A. Okay.

Q. Those are the car. (Indicating.)

A. Okay. Okay, I've looked at them.

Q. Are they an accurate depiction of the way the coverings of the window were situated the night of the incident?

A. Okay. The coverings could have been adjusted for the pictures. As stated before, that there's a gap there, there's a gap. Either this gap or a gap in the blinds. Okay? I don't see a gap in the blinds, if that's where I saw through. So everything else -- As far as there's no furniture, we already talked about that.

Q How about the way the shades looked on the window? Did they look that way the night you were there, this incident occurred?

A. Most of the shades -- Right. You cannot see on the shades. There were a couple of them you could not see through at all, correct.

Q. All were closed, however?

A. All attempted to, they were closed.

Q. But there was a gap?

A. Yes.

* * *

Q. The area that you stood on when you looked through the window is a grassy area, dirt and grass?

A. Yes.

Q. You said that you saw people on previous occasions on the grassy area, when you went by that area in the past?

A. Several, yes.

Q. Okay. Those are the people that live there?

A. Some are, some aren't.

Q. There are no signs on that grass which invite people to use it as public facility, is that correct?

A. I've never seen one, no.

Q. There are no swings there?

A. Not on that section, no.

Q. And there's nothing of recreational invitation, shall we say, there, like a swimming pool or sandbox?

A. Not there, no.

Q. But you've seen people walk on that grass?

A. Lots of times.

* * *

Q When you say you've seen both kinds of people, people who live there and people who don't live there walk an the grass --

A. Yes.

Q. -- how do you know they don't live there? How do you know they live there?

A. This apartment complex is probably one of the worst ones we have in Eagan. I've worked it for six years. I have stopped hundreds of people in that apartment -- in that area. We get called there for domestics, loud parties. People come and go all the time. So I know personally that not all of them live there.

Q. You've questioned them and they've told you I don't live there?

A. Yes.

Q. What have you told them?

A. I ask them where they belong.

* * *

REDIRECT EXAMINATION

BY MR. PROKOPOWICZ:

Q. Officer, this apartment complex is an adult only, family complex? What is it?

A. Family.

Q. It's common to see children running around and the like?

A. If you don't, there's something wrong. Yes, it is.

Q. In fact, Officer, showing you Exhibit 33, there's children in that picture, isn't there?

A. I see two of them and an adult.

Q. That's right outside the building we're talking about, is that correct, 3943 door?

A. Correct.

Q. In fact, one of those children isn't even on the sidewalk, are they?

A. No.

MR. COWAN: Can I see the picture?

MR. PROKOPOWICZ: (Hands exhibit to counsel.)

BY MR. PROKOPOWICZ:

Q. Showing you Exhibit No. 15, Officer, again, that's another photograph of that particular building, is it not?

A. 3943, correct.

Q. And basically that's the entryway we're talking about, is that correct?

A. For that building, yes.

Q. In fact, right next to the window that you circled you were looking through there's a bicycle, is that correct?

A. Yes, there is.

Q. And that bicycle isn't on the sidewalk or cement area, is it?

MR. COWAN: I'm sorry, I don't see it.

MR. PROKOPOWICZ: (Indicating.)

A. No, it's not.

BY MR. PROKOPOWICZ:

Q. It's right next to the window you were looking at, is that correct?

A. Yes.

* * *

Okay. It's not the best. But what we have, front door is here, kitchen is just to the left, if you take a right, you go down to the bathroom and a couple bedrooms, the closet down the hallway. You walk straight through -- this should probably be here. You walk right into the

living room. This whole area in here is living room. And the window that I was looking through, this is one right here. This is that small, one pane window. Here's that four-pane window. And the dining room where they were sitting is right here. And that goes into the kitchen and back out the door. (Indicating.)

Q. Can you indicate with an X where you were standing when you initially observed the activity inside the apartment?

A. Okay. That was that brick abutment that comes out next to the window, and I would have been standing along side that.

Q. Can you put an X there?

Q. And then later you moved more towards the middle of the window, is that correct?

A. I probably went not quite to the middle.

* * *

Q. You were inside the abutment at one point?

A. When we went back with the search warrant, yes.

Q. No, the abutment that you talked about.

A. Oh, here. (Indicating.)

Q. You moved in closer to the window at one point?

A. I could have moved in a little closer. I could have stayed even with it, yes.

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

AFFIDAVIT

Kimberly Celeste Thompson,
Melvin Johns and Wayne
Thomas Carter,

Defendants.

Jeff Mohr, being first duly sworn, state and alleges as follows:

1. That he is one of the attorneys for the Defendants.

2. That an issue at the suppression hearing involved the expectation of privacy of the occupants of an apartment. That a set of keys to the apartment were in the possession of Defendant Wayne Carter when he was arrested and were inventoried and taken into possession by the Dakota County Sheriff's Department.

3. That the keys were released by the Sheriff's Department, the record of this release was not in the materials turned over to the Defendants by the prosecutor.

4. That the control and possession of the keys is material to the expectation of privacy issue before the Court.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated: 9-29-94 /s/
Gordon G. (Jeff) Mohr

Subscribed and sworn to before me
this 29th day of Sept., 1994.

/s/ Janice M. Godwin
Notary Public

JANICE M. GODWIN
NOTARY PUBLIC-MINNESOTA
HENNEPIN COUNTY
My Comm. Expires 9/24/98

Exhibit 8

Exhibit 9

Exhibit 10

Exhibit 11

Exhibit 12

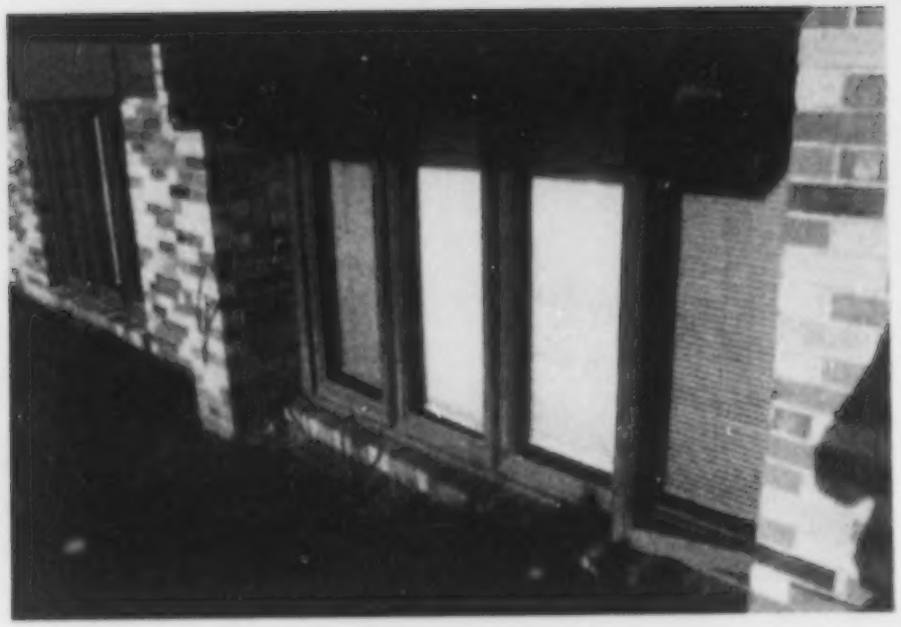

Exhibit 13

Exhibit 15

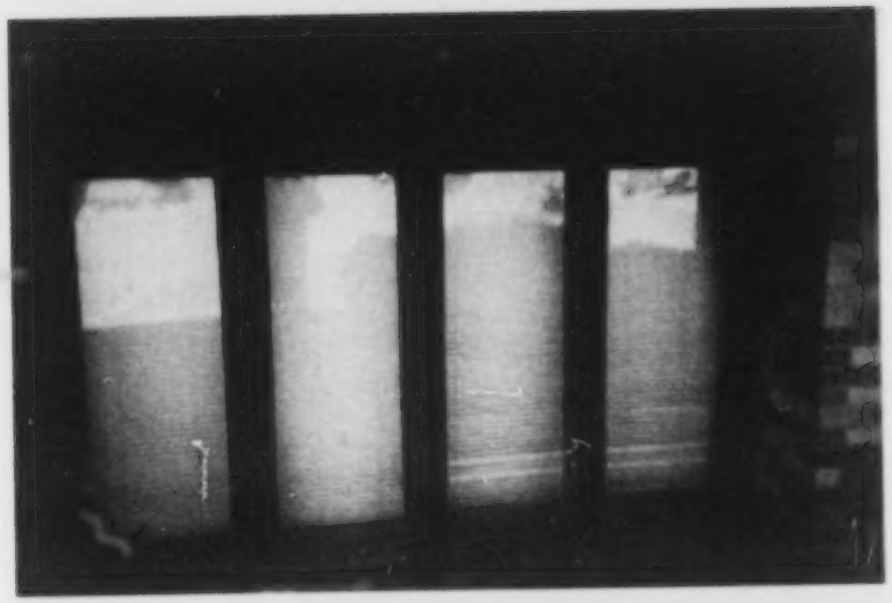

Exhibit 30

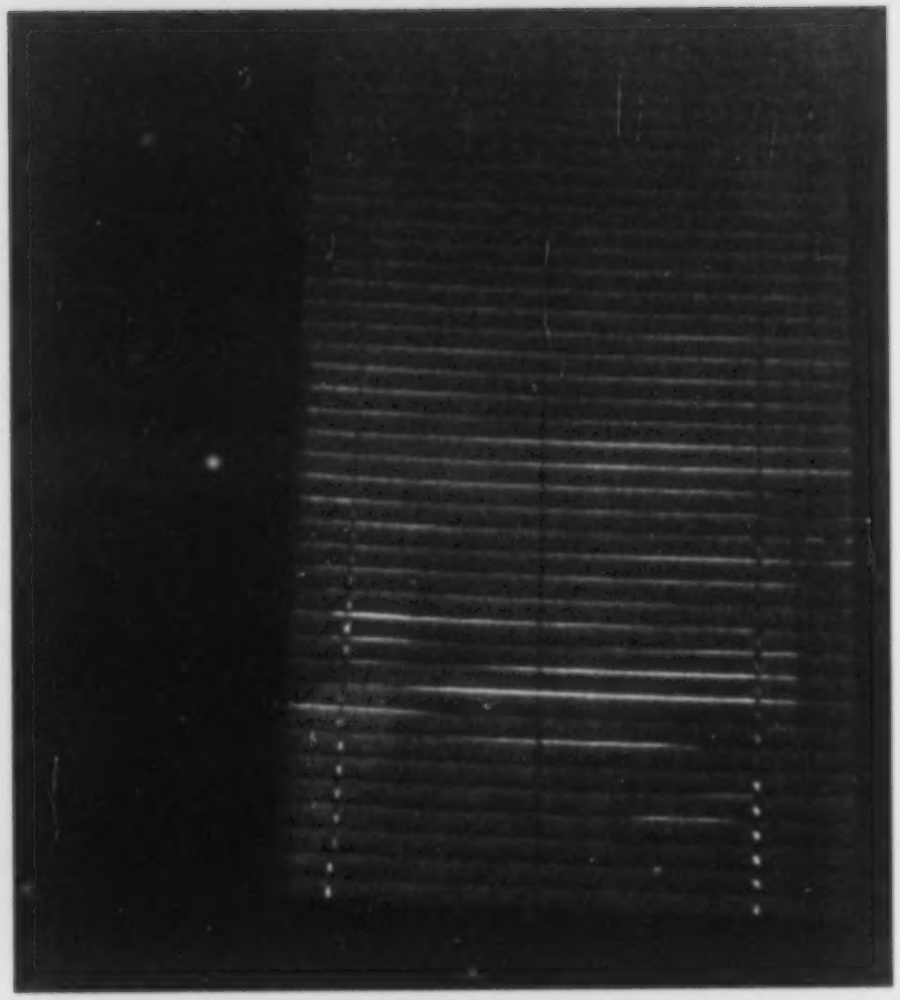

Exhibit 39

Exhibit 42

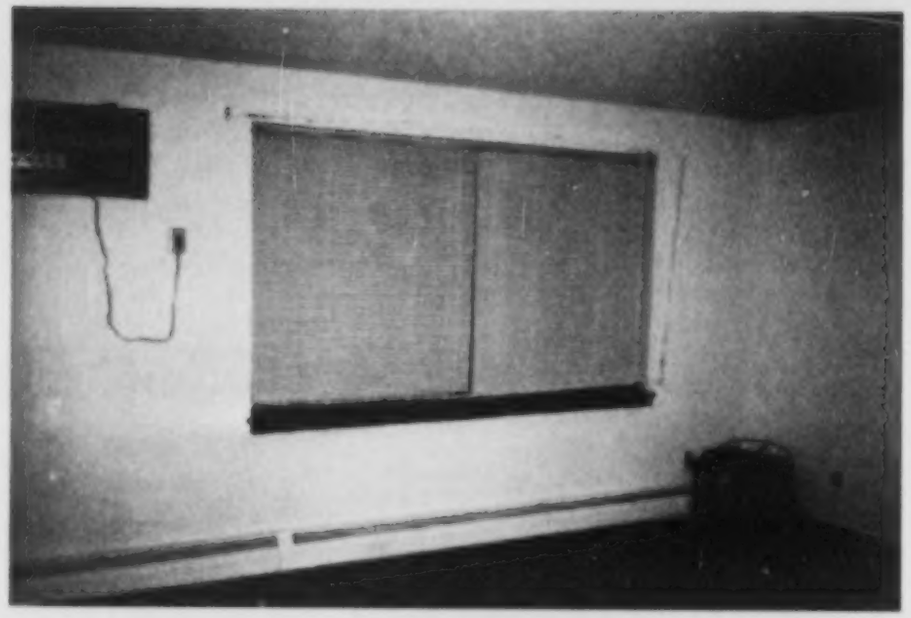

Exhibit 44

Supreme Court, U.S.
FILED
MAY 14 1998
CLERK

No. 97-1147

In the
Supreme Court of the United States
October Term, 1997

STATE OF MINNESOTA,
Petitioner,

vs.

WAYNE THOMAS CARTER, AND
MELVIN JOHNS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITIONER'S BRIEF ON THE MERITS

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42 pp

QUESTIONS PRESENTED

Whether an invitee into a residence, whose sole purpose for being present is to assist the resident in an illegal activity, has a legitimate expectation of privacy while in the residence under the Fourth Amendment to the United States Constitution.

Whether a police officer's non-enhanced use of his natural senses to observe criminal activity in a residence from a common area outside the curtilage of the residence is a search under the Fourth Amendment to the United States Constitution.

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OPINIONS BELOW

The opinion of the Minnesota Supreme Court in *State v. Carter* (J.A., infra., pp. A1-A28)[1] is reported in 569 N.W.2d 169 (Minn.1997). The opinion of the Minnesota Supreme Court in *State v. Johns* (J.A., infra., pp. B1-B2) is reported in 569 N.W.2d 180 (Minn.1997). The opinion of the Minnesota Court of Appeals in *State v. Carter* (J.A., infra, pp. C1-C8) is reported at 545 N.W.2d 695 (Minn.App.1996). The opinion of the Minnesota Court of Appeals in *State v. Johns* (J.A., infra pp. D1-D5) is unpublished. The opinions of the District Court (J.A., infra, pp. E1-E17) are unreported.

JURISDICTION

The Minnesota Supreme Court filed its opinions in both cases on September 11, 1997. The Minnesota Supreme Court's judgment on Respondent Carter was entered on September 29, 1997. Upon motion of Respondent Johns, the Minnesota Supreme Court entered his judgment on October 1, 1997. The Petition For Writ of Certiorari was filed with the United States Supreme Court on December 29, 1997. The Petition For Writ of Certiorari was granted on March 9, 1998. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(a)(1997).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable

---

[1] "J.A." refers to Joint Appendix.

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF CASE

A. Statement of Facts.

On May 15, 1994, at approximately 8 p.m., Officer Jim Thielen of the Eagan Police Department, while working stationary radar patrol, was approached by an individual with information regarding illegal drug activity. (J.A., infra, p. G7) The individual, whom the officer had never met before, told the officer that he/she had just walked by a nearby apartment window and observed people sitting around a table in the apartment "bagging" a white powdery substance. The individual also advised Officer Thielen that he/she believed the occupants of the apartment were using a blue four-door Cadillac with Illinois license plates which was parked in the apartment complex parking lot. (J.A., infra, pp. G9-G10)

Upon receiving the above information Officer Thielen immediately went to the apartment complex. Officer Thielen approached the apartment which was on the lower level of the building. The officer, while standing on a common grassy area within 12 to 18 inches of the apartment window, was able to look through a gap in the window blinds which were covering the window. Upon doing so Officer Thielen

observed two males and one female sitting at a kitchen table. The officer observed one of the males place a white powdery substance onto the kitchen table. This person passed the substance to the second male who placed the powder in a plastic bag. The second male in turn gave the plastic bag to the female who cut off the ends of the bag and put it on a pile located on the kitchen table. Officer Thielen observed the operation for approximately 10 to 15 minutes during which time 5 or 6 bags were filled. (J.A., infra, pp. G11-G14)

After making the above observations Officer Thielen left the apartment complex. Upon returning to his original location he had a second conversation with the individual who had initially reported the illegal drug activity in the apartment. During this second conversation the individual advised the officer that he/she believed the occupants of the apartment also had a gun. (J.A., infra, G15) Officer Thielen returned to the apartment complex parking lot and located a blue Cadillac with Illinois plates. (J.A., infra, G16-G17) After locating the Cadillac, Officer Thielen returned to the fire station. Officer Thielen contacted Investigator Kevin Kallestad of the South Metro Drug Task Force and told him of the initial report and his subsequent observations. Investigator Kallestad advised Officer Thielen that he would attempt to obtain a search warrant for the apartment and the Cadillac. Investigator Kallestad instructed Officer Thielen to stop and secure the Cadillac should anyone attempt to drive away in it while he was attempting to obtain the search warrant. (J.A., infra, pp. G17-G20)

At approximately 10:30 p.m., a police officer observed two males putting items into the above Cadillac. The two males got into the vehicle and drove away. Police officers stopped the vehicle a short distance away. Police identified the driver of the vehicle as Respondent Carter. The passenger of the vehicle was identified as Respondent Johns. Police ordered both men out of the Cadillac. As police opened the

passenger door to let Johns out they observed in plain view a black zipper pouch and a hand gun on the floor the vehicle. (J.A., infra, pp. G20-G23) Both Carter and Johns were placed under arrest and the Cadillac was towed to a Eagan Police Department where it was eventually searched after officers obtained a search warrant for the vehicle and the apartment. While officers were executing the search warrant on the Cadillac they found cocaine in the black pouch, identification papers for Johns, pagers and a duffel bag containing a digital scale with trace amounts of cocaine. (T., pp. 39, 44-45)[2]

Officers also executed the search warrant on the apartment. At the time the lessee of the apartment, Kimberly Thompson, was present. Officers found cocaine residue on the kitchen table and baggies similar to those found in the Cadillac. (J.A., infra, pp. G1-G2) Officer Thielen was able to identify Carter, Johns and Thompson as the same individuals he had observed through the window bagging cocaine. (J.A., infra, pp. G21-G22) Through subsequent identification officers were able to determine that both Carter and Johns were residents of Chicago, Illinois. (J.A., infra, pp. G3-G6)

On May 17, 1994 the respondents were charged with the crimes of conspiracy to commit controlled substance crime in the first degree pursuant to Minnesota Statutes §§ 152.021, subd. 1(1) and 609.05 (1994)(conspiracy to possess with the intent to sell 10 or more grams of a mixture containing cocaine) and controlled substance crime in the first degree aiding and abetting pursuant to Minnesota Statutes §§ 152.021, subd. 2(1) and 609.05 (1994)(aiding and abetting another to possess 25 grams or more of a mixture containing cocaine.)

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[2] "T." refers to transcript of September 21 and 22, 1994 suppression hearing.

B. How the Federal Question Was Presented.

Both respondents moved the trial court to suppress their statements and all evidence seized from the vehicle and apartment. Respondents argued that Officer Thielen's observations through Thompson's apartment window were an unreasonable search under the Fourth Amendment. Respondents went on to argue that because of the unconstitutional nature of Officer Thielen's actions, any evidence derived from such observations should also be excluded.

The trial court determined that respondents did not have standing to object to the Officer Thielen's observations into the apartment of Kimberly Thompson. The trial court concluded both respondents failed to present evidence of an expectation of privacy in the apartment based upon "understandings that are recognized and permitted by society." *Order Pursuant to Omnibus Hearing*, quoting *Rakas v. Illinois*, 439 U.S. 128, 143-44 n.12 (1978)(J.A., infra., pp. E4 and E8) In reaching its decision the trial court explained that the only evidence presented by the defense showed that the respondents were out-of-state residents who had been at the apartment for a period of time on May 15, 1994. The trial court also concluded that Officer Thielen made his observations from an area in which the respondents had no reasonable expectation of privacy. *Id.* (J.A., infra., pp. E8-E9) The respondents proceeded to trial on stipulated facts and were found guilty of both offenses.

Both respondents appealed their convictions to the Minnesota Court of Appeals challenging the lawfulness of Officer Thielen's observations through the apartment window. The appeals were reviewed by two separate panels of judges. In regard to Respondent Carter, the Minnesota Court of Appeals held that Carter did not have standing to object to the officer's observations as his claim that he was predominately a

social guest is "inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose--to package drugs." *State v. Carter*, 545 N.W.2d 695, 698 (Minn.App.1996)(J.A., infra. p. C6). In regard to Respondent Johns, a second judicial panel of the Minnesota Court of Appeals did not determine the issue of standing, holding that such a determination was unnecessary, as under the totality of the circumstances the officer's conduct was part of a logical in-the-field investigative technique to which the courts give deference because there existed sufficient probable cause to believe that criminal activity would be observed in the apartment. *State v. Johns*, unpublished, (J.A., infra., pp. D4-D5)

Respondents appealed the decisions of the Minnesota Court of Appeals regarding the lawfulness of Officer Thielen's observations to the Minnesota Supreme Court. The Minnesota Supreme Court, in a 4 to 3 decision, specifically held that under the Fourth Amendment of the United States Constitution and related state constitutional provisions, both respondents had standing to challenge the legality of Officer Thielen's observations.[3] In its decision the Court reasoned that although society does not recognize as valuable the task of packaging cocaine for distribution, society does recognize

[3] The Minnesota Supreme Court has in the past adopted the practice of specifically stating if its decision is to be based on independent state constitutional provisions. See, *State v. Scales*, 518 N.W.2d 587 (Minn.1994)(requiring under the Minnesota Constitution that all custodial interrogations be electronically recorded) and *In re E.D.J.*, 502 N.W.2d 779, 781 (Minn.1993)(rejecting the United States Supreme Court's opinion in *California v. Hodari*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) on state constitutional grounds). When a state court decision appears to rest primarily on federal law and when the adequacy and independence of any possible state law is not clear from the face of the opinion a reliance on federal law is presumed absent a clear statement by the state court to the contrary. *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476 (1983).

as valuable the ability of people to invite others into their residences to conduct a common task free from government intrusion, which created a legitimate expectation of privacy for respondents in the apartment of their co-conspirator. The Court also concluded that Officer Thielen took extraordinary measures when he approached within 12 to 18 inches of the apartment window and looked between a gap in the window blinds. Thus the Court held the Officer Thielen engaged in an unreasonable search which violated the respondents' expectation of privacy in the apartment. The Minnesota Supreme Court reversed the decisions of the lower courts. *State v. Carter*, 569 N.W.2d 169, 178 (Minn.1997)(J.A., infra, pp. A12-A24) and *State v. Johns*, 569 N.W.2d 180 (Minn.1997)(J.A., infra, p. B1).

SUMMARY OF ARGUMENT

The purpose of the Fourth Amendment is to protect a person's legitimate privacy interests against unreasonable intrusions by the government. The Amendment was not created for purposes of protecting criminals or making a person's residence a safe haven for criminal activities. Fourth Amendment rights are personal in nature and may not be vicariously asserted. Consequently, visitors cannot rely upon their host's privacy interest in a residence to establish a protected privacy interest under the Fourth Amendment. Each criminal defendant must establish standing to object to a search when the defendant attempts to invoke the controversial exclusionary rule.

The Minnesota Supreme Court wrongly focused its attention upon the relationship of the respondents to the leaseholder rather than upon respondent's relationship to the place searched. If the Minnesota Supreme Court's decision in this case is affirmed, all that will be necessary for a defendant to demonstrate standing is that he is present at the time of the

search and engaged in a common task with the property possessor. The practical effect will be automatic standing. Such a ruling is clearly wrong and should be reversed.

To determine whether a person has a legitimate privacy interest protected under the Fourth Amendment, one must first establish that the person had a subjective expectation of privacy in the area searched and, secondly, that this subjective expectation of privacy is one that society is prepared to recognize as reasonable. To reach these conclusions, a balancing test based upon the totality of the circumstances is properly utilized. Even if a subjective expectation existed, it is constitutionally protected only if it is one society would believe is reasonable. The Minnesota Supreme Court concluded that engaging in a common task with a leaseholder, even if illegal in nature, has a societal value and thus confers by itself standing to challenge a search under the Fourth Amendment. This ignores the totality of the circumstances approach and is clearly wrong.

Respondents in this case failed to present any evidence that they used this apartment for any intimate activities normally associated with a dwelling. They presented no evidence that they had any ownership rights or other property interests in the apartment. They presented no evidence demonstrating any prior contacts with the apartment or that they had any personal effects therein. They presented no evidence regarding their ability to control access to the apartment. All they established is that they were present and engaged in a criminal conspiracy with the leaseholder.

While this Court has previously determined that a person's presence on the premises with the consent of one in lawful possession is a factor to consider, it is clear that the mere fact that one is legitimately on the premises does not by itself control whether a protected privacy interest exists under the Fourth Amendment. Engaging in a common task with the owner or leaseholder of a residence is only one factor to

consider under the totality of the circumstances test. There is no overwhelming societal interest in this factor alone, as is being an overnight guest in the home of another, that renders all other inquires moot for purposes of establishing standing to challenge a search under the Fourth Amendment. Clearly the nature of the common task engaged in must be looked to, and when such task is illegal, as it is in this case, it cannot confer standing by itself. No one in society is willing to accept drug dealing as a reasonable activity worthy of protection. The Minnesota Supreme Court's analysis is contrary to reason, common sense and the interests of society. The ruling also significantly extends the application of the exclusionary rule to the detriment of justice. Respondents should not be granted standing under the Fourth Amendment as a shield to their unlawful activities.

The actions of the police here did not amount to a search protected under the Fourth Amendment. A non-enhanced observation from a common area outside the curtilage of a residence is not a search under the Fourth Amendment. The Minnesota Supreme Court's analysis improperly focuses upon the physical acts the officer took to reach his vantage point for observation, rather than upon the location from which the officer made his observations. This erroneous analysis by the Minnesota Supreme Court opens the door for courts to find varying degrees of privacy interests dependent upon what extraordinary measures an officer took to obtain his/her vantage point. What may constitute extraordinary acts to one may not be extraordinary to another. Such an analysis will result in an inconsistent application of the Fourth Amendment and an inconsistent application of the exclusionary rule to the detriment of societal interests in serving justice.

The ruling of the Minnesota Supreme Court, if allowed to stand, will compromise clear, long-standing Fourth Amendment principles. This Court must reverse the decision

of the Minnesota Supreme Court, reinstate the convictions and reiterate Fourth Amendment doctrinal foundations.

ARGUMENT

I. RESPONDENTS HAVE NOT ESTABLISHED A LEGITIMATE EXPECTATION OF PRIVACY IN THE RESIDENCE OF A CO-CONSPIRATOR WHERE THE SOLE PURPOSE FOR BEING PRESENT IS TO ENGAGE IN ILLEGAL ACTIVITY.

A. The Minnesota Supreme Court has allowed respondents to vicariously assert the privacy rights of another contrary to relevant decisions of the United States Supreme Court.

It has long been established that criminal defendants must identify their personal privacy interests and not the privacy interests of co-conspirators or third parties to seek protection under the Fourth Amendment: "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 966-967, 22 L.Ed.2d 176 (1969).

In the case at hand the Minnesota Supreme Court has determined Carter and Johns had a legitimate expectation of privacy, protected under the Fourth Amendment, in the apartment of a co-conspirator. The Minnesota Supreme Court erroneously concluded that the relationship between the property possessor and the person asserting the privacy interest (even if criminal in nature) will control whether an invitee will have a legitimate privacy interest. According to the Minnesota Supreme Court:

> As the [United States Supreme] Court has carefully noted, arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like do not control. *Jones*, 362 U.S. at 266, 80 S.Ct. at 734. What does control, however, is the nature of the relationship between the property possessor and the person alleging the privacy interest in the property. If the relationship is the type that society recognizes as valuable, then we will find standing. If it is not, then we will not. Although society does not recognize as valuable the task of bagging cocaine, we conclude that society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity.

Carter, supra, 569 N.W.2d 169, 176 (Minn.1997)(J.A., infra, p. A18).

This ruling, if allowed to stand, will let a guest or invitee stand in the same shoes as the owner or leaseholder of the property for purposes of determining whether the guest or invitee has standing to challenge a search under the Fourth Amendment. Visitors cannot rely upon their host's privacy interest in a residence to establish a protected privacy interest under the Fourth Amendment. Such a position not only is inconsistent with this Court's prohibition against the vicarious assertion of Constitutional rights, but also significantly reduces a defendant/invitee's burden of demonstrating a personal privacy interest in the area searched. If the Minnesota Supreme Court's decision is affirmed, all that will be necessary for a defendant to demonstrate is that he is present at the time of the search and engaged in a common task with the property possessor.

The Minnesota Supreme Court's ruling will inappropriately change the focus of a suppression hearing

from the defendant's/invitee's relationship to or privacy interest in the residence to the defendant's relationship with the property possessor. This is clearly inappropriate and inconsistent with the totality of the circumstances test utilized by this Court which appropriately focuses upon the defendant's relationship to the premises. See, *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). The Minnesota Supreme Court's analysis is also inconsistent with its own prior Fourth Amendment ruling in *State v. Richards*, 552 N.W.2d 197 (Minn. 1996), where it determined that a defendant who leased a storefront in the name of a corporation, but merely used the premises to store items of a non-personal nature, did not have standing to contest the search of the storefront although he had told others he intended to operate a business from the storefront, cleaned the storefront, covered windows and installed a lock. In this prior case, the Minnesota Supreme Court properly considered the relationship of the defendant to the premises in concluding the defendant lacked standing to challenge a search therein.

Proof problems will also exist should this Court affirm the decision of the Minnesota Supreme Court and allow defendants to base the legitimacy of their privacy interest solely upon engaging in a common task with a co-conspirator. How will the prosecution be able to secure the testimony from the host concerning the host's privacy interests in the area searched if the common task were illegal in nature? Surely, the host would have the unassailable right to assert their Fifth Amendment privilege against self-incrimination. Therefore, this Court should reverse the decision of the Minnesota Supreme Court and adhere to its long standing principle that Fourth Amendment rights are personal in nature and focus its attention on the activities of Respondents Carter and Johns and their relationship to or privacy interest in the premises or area searched. *United States v. Salv*ucci, 448 U.S. 83, 86, 100 S.Ct. 2547, 2550, 65 L.Ed.2d 629 (1980); *Rakas v. Illinois*,

439 U.S. 128, 133, 99 S.Ct. 421, 425, 58 L.Ed.2d 387 (1978); *Brown v. United States*, 411 U.S. 223, 230, 93 S.Ct. 1565, 1569, 36 L.Ed.2d 208 (1973) and *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 966-967, 22 L.Ed.2d 176 (1969).

B. Under the totality of the circumstances Carter and Johns have not established a legitimate expectation of privacy in the apartment of a co-conspirator.

Since its landmark decision in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) this Court has consistently applied a two part analysis in determining whether an individual has standing to object to an unreasonable search under the Fourth Amendment. The first consideration is whether the defendant by his conduct has exhibited a subjective expectation of privacy. The second consideration is whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable. *Smith v. Maryland*, 442 U.S. 735, 741-742, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979). Under the facts presented in this case, Respondents Carter and Johns have not proven that they had a subjective expectation of privacy in the apartment in question because of the existence of a gap in the window blinds through which Officer Thielen made his observations. Even if such a subjective expectation of privacy existed, it will be constitutionally protected only if it is one society would believe is reasonable or legitimate. It has long been the position of this Court that the burden is upon the defendant to present sufficient evidence which clearly demonstrates that society is prepared to recognize defendant's expectation of privacy as reasonable or legitimate. *United States v. Salvucci*, 448 U.S. 83, 86, 100 S.Ct. 2547, 2550, 65

L.Ed.2d 619 (1980) and *Jones v. United States*, 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697 (1960).

Respondents Carter and Johns seek Fourth Amendment protection for their illegal activities in the apartment of a co-conspirator. On occasion an individual may have a legitimate or reasonable expectation of privacy in areas owned or lawfully possessed by third parties. *Rakas v. Illinois*, supra, 439 U.S. at 142, 99 S.Ct. at 430, 58 L.Ed.2d 387 (1978). However, this Court and the Minnesota Supreme Court have acknowledged that "arcane distinctions developed in property and tort law between guests, licenses, invitees, and the like do not control." *Jones v. United States*, 362 U.S. 257, 266, 80 S.Ct. 725, 733-734, 4 L.Ed.2d 697 (1960) and *Carter*, supra, 569 N.W.2d at 176 (Minn.1997) (J.A., infra, p. A18).

Since *Rakas v. Illinois*, supra, this Court has properly applied a balancing test based upon the totality of the circumstances in determining the legitimacy of the defendant's privacy interest under the Fourth Amendment. This Court has not identified any particular factor as controlling. Facts and circumstances which this Court has considered include: the nature and purpose for which the area searched was used, whether the defendant was present at the time of the search, whether the defendant owned the premises or had other property interests in area searched, whether defendant regularly visited the area or had spent a considerable amount of time in the area, actions of the defendant to exclude access to the area by third parties, the ability of the defendant to exclude others from the area searched, societal values or interests in protecting the privacy interest and the intent of the Framers of the Fourth Amendment. See, *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990); *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987); *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984);

Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); *Mancusi v. DeForte*, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); and *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).[4]

In the case at hand, Carter and Johns have not presented any evidence of ownership or other property interest in the apartment. Respondents have not presented any evidence demonstrating any prior contacts with the apartment or that they had spent considerable time at the apartment. Carter and Johns have not presented any evidence that they had personal effects within the apartment or any evidence regarding their ability to control access to the apartment.[5] Most importantly, Carter and Johns have not demonstrated that the activities that

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[4] The totality of the circumstances approach applied by the United States Supreme Court to standing issues is consistent with its approach to related Fourth Amendment issues. See, *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (sufficiency of probable cause to issue search warrant), *Schneckloth v. Bustmonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (voluntariness of consent to search), *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct.1868, 20 L.Ed.2d 889 (1968) (justification for stop and frisk).

[5] After the suppression hearing had concluded Respondent's attorney filed an affidavit alleging that he was aware that a set of keys were in possession of Carter at the time he was arrested which contained a key to the apartment. (J.A.., infra, pp. H1-H2) However, there is nothing in the record to support Carter's claim that he had a key to the apartment and the State has never stipulated to defense counsel's assertion in this regard. It is also clear that this was not a consideration of the trial court or any Minnesota appellate court. The Minnesota Supreme Court based its decision only upon the fact that Carter was present and engaged in a common task with the leaseholder at the time of the search.

they were engaged in were intended to be protected by the Fourth Amendment.

All that Respondents Carter and Johns have established is that they were present and engaged in a criminal conspiracy with the leaseholder. Every Court which has reviewed this case has confirmed this factual finding. The trial court concluded:

> No evidence was presented at the hearing that the defendant had lived at this apartment long term, was an overnight guest or was related to the leaseholder. The only evidence presented showed that the defendant was a resident of Chicago, Illinois and had been present at the apartment for a period of a few hours on May 15, 1994, during police observations.

Order Pursuant to Omnibus Hearing, (J.A., infra, p. E7).
The Minnesota Court of Appeals concluded:

> Carter's claim that he was predominately a social guest in the apartment is inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose—to package drugs.

State v. Carter, 545 N.W.2d 695, 698 (Minn.App.1996) (J.A., infra, p. C6).
The majority of the Minnesota Supreme Court concluded:

> . . . it is undisputed that Carter failed to produce any evidence that he was a "guest" of Thompson's, let alone an "overnight guest."

State v. Carter, 569 N.W.2d 169, 174-175 (Minn.1997)(J.A., infra, p. A15).

The dissenting opinion of the Minnesota Supreme Court concluded:

> Here, Carter established nothing beyond the fact that he was present in Thompson's apartment for a period of 2 ½ hours. He introduced no evidence that he had any prior relationship with Thompson, that he had ever been to her apartment before the night of his arrest, that he had personal effects in the apartment, that he had a key to the apartment, that he could invite or exclude others, or that he had any connection with the apartment other than his presence at the time of the search. The record is simply void as to any indicia that Carter was anything more than a brief, transient visitor.

Id., 569 N.W.2d at 180 (Stringer, J., dissenting, joined by Keith, C.J. and Blatz, J.) (J.A., infra, p. A27)

The purpose of the Fourth Amendment is to protect a person's legitimate privacy interests against unreasonable intrusion by the government. *Katz v. United States*, 399 U.S. 347, 350-351, 88 S.Ct. 507, 510-512, 19 L.Ed.2d 576 (1967). The Amendment was not created for the purpose of protecting criminals or making a person's residence a safe haven for criminal activities. It therefore becomes the responsibility of the courts to balance one's subjective expectation of privacy with the privacy interests the Fourth Amendment was designed to protect. *Rakas v. Illinois*, 439 U.S. 128, 140, 99 S.Ct. 421,429, 58 L.Ed.3d 387 (1978).

The Minnesota Supreme Court acknowledges the proper test of standing under the Fourth Amendment, in holding that:

> ...the person must establish only that under the totality of the circumstances, the person's subjective expectation [of privacy in the location searched] was

> the type of expectation that "society" is prepared to recognize as "reasonable."

Carter, supra, at 175 (J.A., infra, P. A15)

However, it has clearly misapplied this test under the facts of this case. The Minnesota Supreme Court, primarily relying on *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990), reasoned that the ability of a property possessor to invite others into a residence to engage in a common task free from government intrusion has social value which in turn creates a constitutionally protected privacy interest. *Carter*, supra, at 176 (J.A., infra, p.A18) However, for the very reason that this Court determined that overnight guests have a legitimate expectation of privacy in the residence of another, this Court should reject the decision of the Minnesota Supreme Court in the instant case.

In *Minnesota v. Olson*, supra, this Court concluded that an "overnight guest" has a legitimate privacy interest protected by the Fourth Amendment. Justice White in delivering the opinion of the Court explained:

> To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a long-standing custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a house guest has a legitimate expectation of privacy in his host's home.

Id., 495 U.S. at 98, 110 S.Ct. at 1689, 109 L.Ed.2d 85 (1990). It is clear from the above language in *Olson* that the nature and purpose for a person's presence is a consideration which courts should examine in determining the reasonableness of a defendant's privacy interest under the Fourth Amendment. Yet, the Minnesota Supreme Court has totally ignored this important analysis by deeming irrelevant the illegal nature of the activity and focusing only upon the fact that Carter and Johns were involved in a common task with the apartment's owner.

The Minnesota Supreme Court has reached the absurd conclusion that although society does not consider the packaging of narcotics for illegal sale as valuable, it does recognize as an important societal interest one's ability to do so in the premises of another in concert with the owner or leaseholder. *Carter*, supra, at 176 (J.A., infra, p. A18). As noted above, no facts have been established by respondents here other than that they were present for the sole purpose of engaging in unlawful activity with the apartment's resident. Society clearly should not be prepared to recognize this conduct as reasonable. The Minnesota Supreme Court's conclusion that engaging in a common task, be it legal or illegal, with a property owner or leaseholder is something society values or recognizes as "reasonable," thereby conferring by itself standing under the Fourth Amendment, ignores the totality of the circumstances approach and is clearly wrong. This Court should not abandon the well-reasoned "totality of the circumstances" approach which is true to the fidelity and purposes of the Fourth Amendment by affirming the conclusion reached by a simple majority of the Minnesota Supreme Court.

The only implication which can be drawn from the facts that Carter and Johns were present and engaged in a common task with the apartment's leaseholder at the time of the search

is that they were invitees into the apartment and nothing more. Where the record shows an invitee was in a residence only for purposes of engaging in criminal activity, the protections of the Fourth Amendment have never been extended by this Court. Persons are not always invited into a residence for lawful purposes or reasons which serve societal interests. Recognizing a legitimate privacy interest under the Fourth Amendment upon the mere showing that one was present in a residence with the consent of the owner or leaseholder and engaged in a common task with their host, should be rejected as overly broad and inconsistent with the fundamental purposes of the Fourth Amendment. Such a ruling is tantamount to re-establishing the "legitimately on the premises" standard first articulated in *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), but later rejected. See, *Rakas*, supra, 439 U.S. at 142-145, 99 S.Ct. at 429-433, 58 L.Ed.2d 387 (1978).

The Minnesota Supreme Court has in essence created a "bright line" rule concerning standing under the Fourth Amendment based only upon consensual presence and engagement in a common task with the property possessor. This Court has previously engaged in a debate regarding whether a case by case examination of the "totality of the circumstances" should be replaced with "bright line" rules that define the applicability of the Fourth Amendment. See, *Rakas*, supra, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (Rehnquist, opinion of the Court, Powell, J., concurring, joined by the Chief Justice)(White, J., dissenting joined by Brennan, J., Marshall. J., and Stevens, J.). In its debate, this Court has been mindful of the wide variety of circumstances upon which persons may find themselves in the residence of a third party. In rejecting the axiom that mere legitimacy of a person's presence at the location searched provides protection under the Fourth Amendment, the Court explained:

> . . . we are not forsaking a time-tested and workable rule, which has produced consistent results when applied, solely for the sake of fidelity to the values underlying the Fourth Amendment. Rather, we are rejecting blind adherence to a phrase which at most has superficial clarity and which conceals underneath that thin veneer all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment.

Id., 439 U.S. at 147. 99 S.Ct. at 432, 58 L.Ed.2d 387 (1978). This Court should not establish presence and relationship with the property owner or leaseholder as the controlling factors upon which a legitimate privacy interest will rest in the mistaken belief it will clearly define protected privacy interests of individuals in the residences of third parties.

The existence of a common task relationship with one in lawful possession of a premises does little to clarify the extent of one's privacy interest in an area lawfully possessed by another. For example, would defendants have a legitimate expectation of privacy in other areas associated with the premises, such as bedrooms, storage areas or areas immediately surrounding the premises which defendants had never visited? If not, would the legitimacy of the privacy interest change if a defendant knew that the areas were being used to store or manufacture items in furtherance of the common task or conspiracy? Would a defendant have the same legitimate expectation of privacy if third parties, such as roommates or acquaintances that were not part of the conspiracy, were present or had access to the area? Would a defendant be allowed to assert the protections of the Fourth Amendment if the leaseholder/co-conspirator had left a few minutes before the search and the defendant remained and continued to engaged in acts in furtherance of the common

task or conspiracy? Would a defendant retain a protected privacy interest if at the time of the search he was engaged in a common task with an overnight guest or other invitee of the property owner or leaseholder that was not aware of the illegal activity? Recognizing the variety of circumstances in which a person may be present in the areas subjected to a government search, a more conscientious approach in determining the applicability of the Fourth Amendment is to examine the totality of the circumstances on a case by case basis. *Rakas*, 439 U.S. at 147, 99 S.Ct. at 432, 58 L.Ed.2d 387 (1978).

Carter and Johns have failed to present any evidence that they had used the apartment for those intimate activities and privacy normally associated with a dwelling. Instead the evidence clearly indicates the sole purpose for their presence inside the apartment was to engage in the illegal possession and packaging narcotics for future sale. Society does not accept drug dealing as a reasonable activity worthy of protection. The illegal possession and distribution of drugs destroys family relationships, friendships, and the lives of people in this country on a daily basis. The fact that an invitee may be engaged in a common task with the owner or leaseholder of a residence may properly be one factor for consideration under the totality of the circumstances for purposes of Fourth Amendment analysis. However, there is no overwhelming societal interest in this factor alone, as there is in being an "overnight guest" in the home of another, that renders all other inquiries moot for purposes of establishing standing under the Fourth Amendment. Clearly the nature of the common task engaged in is worthy of inquiry in this analysis, and when such common task is illegal in nature, as it is in this case, it cannot be regarded as conferring such standing in and of itself. The Minnesota Supreme Court has chosen to ignore the illegal nature of the common task under the belief that society values protecting the ability of a resident to engage in a common task with an invitee under any

circumstances. This position is contrary to reason and common sense and does not represent a true reflection of society's values. It should be rejected by this Court.

The Fourth Amendment was designed to protect privacy interests within a dwelling that are important and valuable to society. It was not designed to protect criminal activity. Having presented no evidence of activity normally associated with a dwelling or legitimate privacy interests, respondents' attempt to seek protection of the Fourth Amendment for their illegal activities in the apartment, on the sole grounds that they were present in a dwelling and engaged in a common task with their co-conspirator, should fail.

C. The Minnesota Supreme Court's decision significantly expands the application of the exclusionary rule to the detriment of justice.

Evidence obtained in violation of the Fourth Amendment may be excluded at trial. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). However, this Court has repeatedly observed that an unfettered application of the exclusionary rule is detrimental to our society and our system of justice:

> The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or

> convicted on the basis of all the evidence which exposes the truth. Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected.

Rakas v. Illinois, 439 U.S. 128, 137, 99 S.Ct. 421, 427, 58 L.Ed.2d 381 (1978) quoting *Alderman v. United States*, 394 U.S. 165, 174-175, 89 S.Ct. 961, 967, 22 L.Ed.2d 176(1976). See also, *United States v. Ceccolini*, 435 U.S. 268, 275, 98 S.Ct. 1054, 1059, 55 L.Ed.2d 268 (1978); *Stone v. Powell*, 428 U.S. 465, 489-490, 96 S.Ct. 3037, 3050, 49 L.Ed.2d 1067 (1976); and *United States v. Calandra*, 414 U.S., 338, 348-352, 94 S.Ct. 613, 620-622, 38 L.Ed.2d 561 (1974).

Here, the Minnesota Supreme Court has ruled that an invitee who is present and engaged in a common task with the leaseholder of the premises has a reasonable expectation of privacy protected under the Fourth Amendment. Failure to reverse this decision of the Minnesota Supreme Court will significantly expand the extent of a defendant's privacy interest and application of the exclusionary rule contrary to existing decisions of this Court. For example, if it is the relationship between a host and invitee as defined by the "common task" that the Minnesota Supreme Court deems socially important and controlling, would the drug dealer's privacy interest cease if either he or the resident left the premises for a short period of time and the other remained for the purpose of continuing the common goal? Likewise, what would be the reasoning for not extending a drug dealer's privacy interests to other areas of the residence such as bedrooms, storage areas or vehicles possessed by the resident if they were used to manufacture, store or transport drugs for illegal sale. Attempts by defendants to attain standing in similar factual situations have been denied. See, *United*

States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) (Defendant did not have standing to object to search of mother's residence where he stored stolen property); *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed. 633 (1980) (That defendant owned drugs that were in the purse of a female acquaintance did not have standing to object to the search of the purse); *Rakas v. Illinois*, supra, 439 U.S.128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (Occupants of a motor vehicle who have no proprietary or possessory rights in the motor vehicle have no standing to contest a search of the glove compartment); and *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973) (Defendants who were not present at time of search of coconspirator's store had no standing to contest the search as they had no proprietary or possessory interest in the store.).

In attempting to apply the Minnesota Supreme Court's holding to future cases, courts will have difficulty finding a case in which the application of the exclusionary rule is not a possibility. Virtually everyone who is invited into a residence does so for the purpose of engaging in a common task with the resident. Those invited into a residence to stay overnight, to visit, to attend social functions or to engage in business transactions are all engaging in a common task with the resident. Under the Minnesota Supreme Court's holding, a drug dealer who is invited into a residence would have a constitutionally protected privacy interest in the premises by virtue of negotiation with the resident over the sale and purchase of illegal drugs. Such a privacy interest would exist even if negotiations for the illegal sale occurred in the entryway of the residence for only for a brief period of time. The practical effect of the Minnesota Supreme Court's ruling is to provide automatic standing to invitees in the premises of third parties.

In excluding potentially probative evidence to protect constitutional principles, this Court has had misgivings as to

the benefit of enlarging the class who may invoke the exclusionary rule:

> [T]he exclusionary rule "has been restricted to those areas where its remedial objectives are most efficaciously served." *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974). The Court has acknowledged that the suppression of probative evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case. E.g., *Rakas v. Illinois*, supra, 439 U.S., at 137-138, 99 S.Ct., at 427-28; *United States v. Ceccolini*, 435 U.S. 268, 275-279, 98 S.Ct. 1054, 1059-61, 55 L.Ed.2d 268 (1978); *Stone v. Powell*, 428 U.S. 465, 489-491, 96 S.Ct. 3037, 3050-3051, 49 L.Ed.2d 1067 (1976); see, *Michigan v. Tucker*, 417 U.S. 433, 450-451, 94 S.Ct. 2357, 2367, 41 L.Ed.2d 182 (1974). Our cases have consistently recognized that an unbending application of the exclusionary sanction to enforce ideals of government rectitude would impede unacceptably the truth-finding functions of the judge and jury. E.g., *Stone v. Powell*, supra, 428 U.S. at 485-489, 96 S.Ct., at 3048-3050; *United States v. Calandra*, supra, 414 U.S., at 348, 94 S.Ct., at 620. After all, it is the defendant, and not the constable, who stands trial.

United States v. Payner, 447 U.S. 727, 734, 100 S.Ct. 2439, 2445-2446, 65 L.Ed.2d 468 (1980).

Respondents have failed to demonstrate that application of the exclusionary rule as suggested in the instant case is necessary to curtail unlawful police conduct. Respondents have not identified any abuse of police power. The government will still risk the possible exclusion of evidence

in cases involving residents, overnight guests or other invitees who can identify a legitimate privacy interest in the premises under the totality of the circumstances. It is important that the application of exclusionary rule be based upon principles which are consistent with the fundamental purposes of the Fourth Amendment. Society's expectations, life experiences, reason and common sense must be considered. It is only upon such consideration that society's confidence and acceptance of our system of justice will prosper. Affirming the decision of the Minnesota Supreme Court in this case will erode public confidence in our system of justice and generate disrespect for the law by inappropriately expanding the exclusionary rule in countless cases.

II. AN OFFICER'S NON-ENHANCED USE OF HIS NATURAL SENSES TO OBSERVE CRIMINAL ACTIVITY IN A RESIDENCE FROM A COMMON AREA OUTSIDE THE CURTILAGE OF A RESIDENCE IS NOT A SEARCH UNDER THE FOURTH AMENDMENT.

In the instant case investigating officers obtained search warrants for the vehicle and apartment. Respondents challenge whether the information contained in the supporting affidavits was obtained in violation of their constitutional rights. In *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), it was decided that the use of listening devices and other artificial means to enhance one's natural senses may violate the defendant's legitimate expectation of privacy even though the interception or observation occurs in a public place. However, this Court has explained: "What a person knowingly exposes to the public, even in his own home or office, is not subject of a Fourth Amendment protection." *Id.*, 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d

576 (1967). As a result this Court has consistently held that non-enhanced observations from areas outside the curtilage of a residence are not searches under the Fourth Amendment even though the officers may have taken extraordinary steps to gain a vantage point from which their observations were made. *Florida v. Riley*, 488 U.S. 445, 449, 109 S.Ct. 693, 696, 102 L.Ed.2d 835(1989)(officer's observation, with his naked eye, of interior of partially covered greenhouse in residential backyard from helicopter circling 400 feet above did not constitute a search); *United States v. Dunn*, 480 U.S. 294, 303-304, 107 S.Ct. 1134, 1140-1141, 94 L.Ed.2d 326 (1987) (warrantless observation into a barn outside the curtilage of a residence used to illegally manufacture controlled substances is not a search under the Fourth Amendment); and *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986)(warrantless aerial observation, with naked eye, of fenced-in backyard within the curtilage of a home was not a search).

The Minnesota Supreme Court deemed irrelevant whether Officer Thielen's observations were made from a common area outside the curtilage of the apartment, because it found that the facts that he had left the sidewalk, walked across the grass, climbed over some bushes to a location within 12 to eighteen inches from the window and peered into the apartment through a gap in the blinds constituted such "extraordinary measures" that this alone made the search unreasonable under the Fourth Amendment. Not only was the Minnesota Supreme Court mistaken in its recitation of the facts in this case,[6] the conduct of Officer Thielen was

[6] The record indicates that Officer Thielen never walked on the sidewalk or climbed over bushes in order to look into the window. The record indicates that Officer Thielen approached the window from the west side which is opposite of the sidewalk. Nor was it necessary to climb over or walk around the bushes to get to the observation point. (Transcript

significantly less intrusive than that engaged in by investigating officers in *United States v. Dunn*, 480 U.S. 294, 303-304, 107 S.Ct. 1134, 1140-1141, 94 L.Ed.2d 326 (1987). In *Dunn* law enforcement officers had information that defendant's barn was being used as a location in which drugs were being illegally manufactured. Upon entering the ranch where the barn was located, officers climbed over two barbed wire fences and three wooden fences which surrounded the barn. The officers walked under the barn's overhang to a locked wooden gate and, by shining a flashlight through a netting on top of the gates, were able to see into the barn and observe a phenylacetone laboratory. This Court, accepting for the sake of argument that the defendant enjoyed a legitimate expectation of privacy in the barn, determined that no constitutional violation had occurred:

> As previously mentioned the officers never entered the barn, nor did they enter any other structure on respondent's premises. Once at their vantage point, they merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front. And, standing as they were in the open fields, the Constitution did not forbid them to observe the phenylacetone laboratory located in respondent's barn. This conclusion flows naturally from our previous decisions.

Id., 480 U.S. at 304, 107 S.Ct. at 1141, 94 L.Ed.2d 326 (1987). The Court also thought it was irrelevant that the actions of the police were for the sole purpose of ascertaining

of Omnibus Hearing, J.A., infra, pp. G44-G45 and Exhibits 8 -13, J.A. infra., pp. I1-I7)

whether or not drug activity was present. *Id.*, 480 U.S. at 304-305, 107 S.Ct. 1141, 94 L.Ed.2d 326 (1987).

Here, the Minnesota Supreme Court believed Officer Thielen had taken "extraordinary measures" in approaching and peering through a gap in the blinds. However, such a position ignores the fact that Officer Thielen at the time of his observation was standing on a grass area in the front of a multiple occupancy building. (Exhibits 8-13)(J.A., infra, p. I1-I7) It ignores the fact that Officer Thielen was initially told by a concerned citizen that he could observe the drug activity through the window. (J.A., infra, pp. G7-G-9) It ignores Officer Thielen's testimony that it was common for him to observe tenants and their guests playing in the area where the observations were made from. (J.A., infra, p. G32) It ignores the fact that tenants/guests would lean bicycles against the wall near the window. (Exhibit 11)(J.A., infra, pp. I4) It ignores the fact that Officer Thielen made his observations at dusk from a position that could easily be seen from across the front lawn. (Exhibit 10)(J.A., infra, p. I3) Finally, the Minnesota Supreme Court declared irrelevant the trial court's finding that the area from which the officer's observation was made was common to other tenants. *Carter*, supra, 569 N.W.2d at 178 (1997) (J.A., infra, p. A22).

The Minnesota Supreme Court in its ruling established a standard which wrongfully focuses primarily upon the methods the officer used to reach his vantage point, rather than upon the location from which the officer's observations were made. It is clear that this Court has chosen to focus its attention concerning whether a search occurred under the Fourth Amendment upon the location from which the officer's observations were made and not on the methods the officer used to reach his/her vantage point. See, *Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989); *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326

(1987); and *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

Additionally, the proper inquiry does not rest upon whether the officer has positioned himself in a location not normally accessible to the public, but rather upon whether the location is an "open field" or a common area. Clearly in *Dunn*, supra, the public would not have been normally expected to enter the defendant's ranch, climb over barbed wire and wooden fences and shine a flashlight into the door of a barn to observe what was inside. Nor would one expect the general public to secure a helicopter or plane to fly 400 to 1,000 feet above defendant's backyard to photograph marijuana growing operations as occurred in *Riley* and *Ciraolo*. Yet, in each one of these factual scenarios this Court determined that actions of the officers did not constitute a search under the Fourth Amendment, as the observations were made from a location where the defendant had no constitutionally protected privacy interest.[7]

The decision of the Minnesota Supreme Court has the further potential of having courts in future cases focusing on what physical acts the defendant took to keep third parties from observing his or her illegal activities rather than upon the location from which the observation was made. For example, is the defendant afforded greater protection because he built an eight foot high privacy fence around his backyard marijuana growing operation than the defendant who erected only a five foot high privacy fence? An officer walking by would have to take the extraordinary step of obtaining a ladder or similar equipment to observe the illegal activity in

[7] The Court has also determined that no unreasonable search occurs when the officers have used electronic devices to assist their natural senses in observing defendant's activities where there existed no legitimate expectation of privacy. See, *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983)

the former, while in the latter scenario the illegal activity could be observed without any assistance. Does a defendant who chooses to engage in activity on the fourth floor of an apartment building receive greater constitutional protections than the ground floor defendant simply because the officer has to undertake additional acts to place himself in a vantage point from which he can see into the fourth floor apartment? The test should not be on how well an individual concealed his or her unlawful activity but whether the officer's location at the time of the intrusion is in a common or public area outside the curtilage of the residence and whether or not the officer used sophisticated surveillance devices not generally available to the public. *Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1988); *United States v. Dunn*, 480 U.S. 294 107 S.Ct. 1134 94 L.Ed.2d 326 (1987); *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed. 210 (1986); *Dow Chemical Company v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986); *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984); and *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). If the observation is made from a location in a common area outside the curtilage without the use of sophisticated surveillance devices, there is no search under the Fourth Amendment. Clearly, such was the case here. Officer Thielen's observations were made from a common area outside the curtilage of the apartment using nothing more than his plain eyesight.

If this Court were to change its primary focus from the location where the officer made his non-enhanced observations to the physical acts the officer took to place himself in a position to make the observation, a significant expansion of the exclusionary rule to criminal cases will occur. Factual situations in which the lower courts may find extraordinary measures were taken by an officer in obtaining his/her vantage point for observations are boundless. What

may constitute extraordinary acts to one may not be extraordinary to another. Probative evidence may be lost because one officer climbed on top on some nearby boxes to look over a fence while another did not. As this Court has explained:

> Application of the [exclusionary] rule deflects the truth finding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through nurturing respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.

Stone v. Powell, 428 U.S. 465, 490, 96 S.Ct. 3037, 3050-3051, 49 L.Ed.2d 1067 (1976). The position asserted by the respondents and the majority Minnesota Supreme Court will result in indiscriminate application of the Fourth Amendment and the exclusionary rule to the detriment of society's interests in seeking justice. Decisions that lack reason and common sense will erode society's confidence in our system of justice. Therefore, the Minnesota Supreme Court's analysis, which opens the door to varying degrees of privacy interests dependent upon the methods an officer used to gain a position from which observations may be made, should be rejected.

CONCLUSION

Respondents have not proven they have standing under the Fourth Amendment to object to the observations of Officer Thielen which formed the basis for obtaining a search warrant. The observations of Officer Thielen were not a search prohibited under the Fourth Amendment. Consequently, the decision of the Minnesota Supreme Court must be reversed.

Respectfully submitted,

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In The

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October Term, 1997

STATE OF MINNESOTA,

Petitioner,

vs.

WAYNE THOMAS CARTER AND
MELVIN JOHNS,

Respondents.

On Writ Of Certiorari To The Minnesota Supreme Court

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QUESTIONS PRESENTED

1. Was the Minnesota Supreme Court correct when it found that respondents, as social guests, had a reasonable expectation of privacy in the home they were visiting?

2. Was the Minnesota Supreme Court correct when it found that Officer Thielen, by leaving the sidewalk, walking across the grass and staring into the apartment window from a distance of twelve inches, violated the Fourth Amendment?

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STATEMENT OF FACTS

The facts, as conclusively stated by the Minnesota Supreme Court:[1]

> At approximately 8 p.m. on the evening of May 15, 1994, an anonymous informant approached Eagan police officer Jim Thielen. The informant, whom Thielen never had seen before, had told Thielen that he/she had walked by apartment 103 at 3943 South Valley View Drive and observed people sitting around a table inside the apartment "bagging" a white powder. The informant also told Thielen that he/she believed the occupants of the apartment had used a blue four-door Cadillac located in the parking lot adjacent to the apartment complex. The informant also told Thielen that the car had an Illinois license plate that read SGD 896. In response to this information, Thielen

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[1] In its brief, the State of Minnesota complains that "the Minnesota Supreme Court was mistaken in its recitation of the facts of this case[.]" State's brief at 28. The state did not, however, move to correct these "mistakes" in a petition for rehearing before the Minnesota Supreme Court, which it certainly had a right to do. *See* Minn.R.Civ.App.Pro. 140.01. Furthermore, the Minnesota Supreme Court takes great care in reviewing trial exhibits, such as the pictures in this case, which certainly indicate that the officer could not have seen what he said he saw from the place he said he was. *See, e.g., State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992) (rejecting trial court factual finding because physical evidence – tape which the court had the benefit of listening to – was to the contrary). Finally, as this Court has stated: "On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this court." *Watts v. Indiana*, 338 U.S. 49, 50 (1949).

then walked toward the window of the apartment by leaving the common sidewalk that led to the apartment building's entrance and stepping on a grassy common area closer to the window. Thielen then walked behind some short bushes located in front of the apartment window and stood approximately 12 to 18 inches from the window. The window's blinds were drawn closed, but gaps in the blinds allowed Thielen to observe the activity in the apartment. While looking through the gaps in the blinds, Thielen observed two males and one female sitting at a kitchen table. One of the males appeared to be placing a white powdery substance onto the kitchen table. This person then would pass the white substance to the second male who then would place the powder into a plastic bag. The second male, who was wearing bedroom slippers, would in turn give the plastic bag to the female who would cut off the ends of the bag and place it on the table.

After observing this activity for approximately 15 minutes, Thielen left the apartment complex and went to a nearby fire station where he had another conversation with the informant and another Eagan police officer. At this time the informant told the officers that the people inside the apartment might be in possession of a gun. Thielen then returned to the apartment complex where he located a Cadillac matching the description given by the informant. He then returned to the fire station, telephoned Officer Kevin Kallestad of the South Metro Drug Task Force, and reported what he had seen. Kallestad instructed Thielen to stop and secure the suspect vehicle should anyone attempt to drive it away. Police also began to prepare affidavits as

a part of a request for warrants to search both the apartment and the Cadillac.

At approximately 10:30 p.m., an Eagan police officer observed two males putting items into the suspect Cadillac. The two males then entered the vehicle and started to drive it out of the parking lot. As per instructions, Eagan police stopped the vehicle at the intersection of Rahn Road and Beau de Rue Drive. The police found Carter in the driver's seat and Melvin Johns in the passenger's seat. The police ordered both men out of the car. As the police opened the door to let Johns out of the car, they observed a black zippered pouch and a handgun, later determined to be loaded, on the floor of the vehicle. The police then placed Carter and Johns under arrest. The police subsequently towed the Cadillac to the Eagan Police Department, and after receiving the signed search warrant at approximately 1:30 a.m. on May 16, the police searched the vehicle. When the officers opened the black zippered pouch, they discovered a white mixture in plastic baggies, Johns' identification, pagers, and a scale. Tests later determined that the white mixture was 47.1 grams of cocaine.

Late in the evening of May 15, after the arrests of Carter and Johns, Eagan police returned to apartment 103 and arrested its occupant Kimberly Thompson. At approximately 3 a.m. on May 16, police executed a search warrant on the apartment and located cocaine residue on the kitchen table and plastic baggies consistent with those found in the automobile

driven by Carter. Thielen subsequently identified Carter, Johns and Thompson as the individuals he had observed in the apartment packaging the white mixture. He identified Carter as the individual he had seen putting the white mixture on the table and dividing it into piles, Johns as the man who wore slippers and placed the piles into baggies, and Thompson as the individual who cut the ends off the baggies and placed the baggies in piles. Police ultimately learned that Carter and Johns were residents of Chicago Illinois, and that Thompson was the sole lessee of apartment 103. Subsequent to his arrest, Carter made a statement to the police in which he admitted ownership of a duffel bag found inside the Cadillac. A search of the duffel bag uncovered a digital gram scale containing traces and residue of cocaine. Johns made a statement to the police admitting he had accepted a proposal to transport cocaine from Illinois to Minnesota for money, and that he, Carter and Thompson had packaged the cocaine at Thompson's apartment. He also admitted that there were approximately two ounces of crack cocaine and a handgun in the vehicle.

State v. Carter, 569 N.W.2d 169, 172-173 (Minn. 1997) (footnotes omitted).

SUMMARY OF ARGUMENT

The Minnesota Supreme Court held that respondents, as social guests, had a legitimate expectation of privacy in the home they were visiting, and, consequently, could object to the police officer's actions in this case. The court

also ruled that the police officer's action – peering through small slits in drawn blinds from a distance of twelve inches – amounted to a Fourth Amendment search.

The Minnesota Supreme Court was correct. Respondents have a right to object to the search because, as social guests, they have a legitimate expectation of privacy in the home which was invaded by the officer. The history of the Fourth Amendment, which indicates that the amendment was drafted to stop searches of places where contraband was being stored, supports respondents' argument. Both the rationale and language of *Minnesota v. Olson*, 495 U.S. 91 (1990), are directly on point and mandate affirmance of the Minnesota Supreme Court's determination that respondent had standing to object to the officer's behavior.[2]

The officer's behavior amounted to a search because, as the Minnesota Supreme Court found, society has determined that the officer's decision to engage in a little

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[2] Both the State of Minnesota and the Amicus Brief of 26 States attempt to recast the issue in this case by implying that this case involves expansion of the exclusionary rule. "Affirming the decision of the Minnesota Supreme Court in this case will erode public confidence in our system of justice and generate disrespect for the law by inappropriately expanding the exclusionary rule in countless cases." Petitioner's brief at 27. "In determining whether the exclusionary rule is applicable, a court is to focus on the extent of a particular defendant's rights under the Fourth Amendment[.]" Brief of 26 States at 6. Of course, the real questions are whether the police have violated the Constitution and whether the Constitution's protections apply to respondents. Resolution of these questions does not require an expansion of the exclusionary rule.

window-peeping was unreasonable; it invaded the privacy of those present inside the apartment.

ARGUMENT

I.

THE MINNESOTA SUPREME COURT WAS CORRECT WHEN IT FOUND THAT RESPONDENTS, AS SOCIAL GUESTS, HAD A REASONABLE EXPECTATION OF PRIVACY IN THE HOME THEY WERE VISITING.

To demonstrate they have a right to complain about the police officer's conduct in this case, respondents must allege a violation of their own constitutional rights, rather than the right of some third party. *United States v. Salvucci*, 448 U.S. 83, 83 (1980). This determination turns on "whether the disputed search . . . has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). A protected Fourth Amendment interest exists when "the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Id.* at 143. Such a legitimate expectation of privacy exists when an individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.' " *Id.* at 143-44 n. 12, quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

In other words, a defendant must show two things to have the right to object to a search: first, he must show a subjective expectation of privacy; and second, he must show that this expectation was reasonable in light of

"longstanding social custom that serve functions recognized as valuable by society." *Minnesota v. Olson*, 495 U.S. 91, 98 (1990). Respondents Carter and Johns have exhibited a subjective expectation of privacy that is reasonable, given the longstanding traditions of the constitution, this Court, and this country.

A.

Minnesota has waived its claim that respondents had no subjective expectation of privacy by failing to assert that claim in the Minnesota courts; in any event, pulling the shades of an apartment as tightly as possible amply demonstrates such a subjective expectation of privacy.

On appeal to this Court, the State of Minnesota has argued that respondents had no subjective expectation of privacy in the apartment they were visiting when the officer peeped in the window. This argument, having been asserted neither to the court below nor to this Court in the petition for writ of certiorari, is not properly before this Court; in any event, respondents exhibited every possible subjective expectation of privacy.

1.

The State of Minnesota may not, for the first time in the history of this case, make a new argument – that respondents did not manifest a subjective expectation of privacy – in their brief to this Court.

For the first time in the over four-year history of this case, the State of Minnesota now argues that "[u]nder the facts presented in this case, Respondents Carter and Johns have not proven that they had a subjective expectation of privacy in the apartment in question because of

the existence of a gap in the window blinds through which Officer Thielen made his observations." Petitioner's brief at 13. But, to quote petitioner's brief to the Minnesota Supreme Court:

> Therefore, the issue to be decided is not whether Appellant had a legitimate expectation of privacy over the inside of the apartment, but whether or not his legitimate expectation of privacy and constitutional right against unreasonable searches and seizures extended to the curtilage of the apartment. It is the position of the State of Minnesota that it did not.

State of Minnesota's brief to the Minnesota Supreme Court at 7. Likewise, in its Petition for Writ of Certiorari to this Court, the State of Minnesota complained only about the Minnesota Supreme Court's determination that respondents' subjective expectation of privacy was reasonable, not that they lacked a subjective expectation of privacy in the apartment:

> The failure of Minnesota's highest court to correctly apply **the second prong** of the United States Supreme Court's analysis of standing (i.e., is the subjective expectation of privacy one in which society will accept as reasonable) has led it to the baffling conclusion . . .

State's petition for Certiorari at 17 (emphasis added).

A litigant challenging the appropriateness of a state supreme court ruling on a federal constitutional question may not present arguments to this Court which have not been presented to the state court and which have not been raised in the petition for certiorari. *Riggins v. Nevada*, 504 U.S. 127, 133 (1992). The state has never before

argued that respondents did not possess a subjective expectation of privacy in the apartment which they were in; consequently, the state is foreclosed from asserting that claim to this Court.

2.

Respondents exhibited a subjective expectation of privacy when, while in the home of another person, they pulled the blinds as tightly as they would go.

If a person does not exhibit a subjective expectation of privacy in relation to his activity, that person cannot claim the protections of the Fourth Amendment. *See Rawlings v. Kentucky*, 448 U.S. 98, 104-105 (1980) (noting, while not holding, that defendant, who had placed contraband in purse of another person present when police were approaching, had little reason to subjectively expect privacy in that purse).

In this case, respondents were in the company of another person at her home; that person had afforded them the privacy of that home. All the people in the apartment exhibited a desire to be left alone; in particular, they exhibited a desire to keep their activities inside the apartment private from outside observation. Indeed, as the Minnesota Supreme Court held, it is "clear that Carter had a subjective expectation of privacy. He was inside the apartment of an acquaintance with the doors shut and the blinds drawn." *State v. Carter*, 569 N.W.2d 169, 174 (Minn. 1997).

B.

The history, purpose, and application of the Fourth Amendment by this Court establish that respondents had a legitimate expectation of privacy in a home in which they were social guests.

As noted, in deciding whether a person may legitimately make a claim that his Fourth Amendment Rights have been violated,[3] this court must focus on whether a defendant "is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties." *Rakas* at 139. As with all Fourth Amendment issues, both the history and purpose of the Amendment are relevant in deciding whether a person has a legitimate expectation of privacy in a particular activity. *United States v. Chadwick*, 433 U.S. 1, 7-8 (1978). This Court, of course, also relies heavily on its own precedents in making its determination of whether a person has a legitimate expectation of privacy in a particular activity. *See, generally, Minnesota v. Olson*, 495 U.S. 91 (1990).

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[3] The concept of "standing" to object to a search has been subsumed under the rubric of an analysis which focuses on whether a person has a "legitimate expectation of privacy." *Rakas v. Illinois*, 439 U.S. 128, 138-39 (1978). While the Court in *Rakas* rejected the notion that it served any "useful analytical purpose" to consider the principle of standing apart from substantive Fourth Amendment analysis, the Court acknowledged that "inquiry under either approach is the same" *Id.* at 138-39. *See also Minnesota v. Olson*, 495 U.S. 91, 101 (1990) (referring to the question of whether Olson had a legitimate expectation of privacy as a question of "standing") (Stevens, J., concurring).

1.

The history and purposes of the Fourth Amendment, as well as the intention of its framers, show that respondents were certainly of the class of people intended to be protected by the Fourth Amendment.

In arguing that respondents may not claim that their own Fourth Amendment rights have been violated, Minnesota's main argument has been that respondents had no legitimate expectation of privacy because they were engaged in illegal activity in the apartment. The state has argued that:

> Clearly the nature of the common task engaged in [by respondents while on the premises as social guests] must be looked to, and when such task is illegal, as it is in this case, it cannot confer standing by itself. No one in society is willing to accept drug dealing as a reasonable activity worthy of protection.

State's brief at 9. The state also asserts, without historical or factual support, that "Carter and Johns have not demonstrated that the activities that they were engaged in were intended to be protected by the Fourth Amendment." State's brief at 15-16. The state also makes the unsupported claim that the Fourth Amendment "was not created for the purpose of protecting criminals or making a person's residence a safe haven for criminal activities." State's brief at 17.

In the narrowest possible way, the state is correct. The *purpose* of the framers of the Fourth Amendment was not to shield illegal activity from government intrusion. However, there is no question that the framers were well aware that the Fourth Amendment would inevitably

insure that some illegal activity would not be detected. And there is also no question that they believed that this was a side effect worth accepting. The clear intent of the authors of the Fourth Amendment was to protect people from unwarranted government intrusions, *even when the people enjoying this protection were engaged in illegal activities – including the possession, distribution, and storage of contraband.*[4] "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona v. Hicks*, 480 U.S. 321, 329 (1987).

As this Court has explained, the Fourth Amendment came into being as a specific reaction to "the ransacking by Crown officers of the homes of citizens in search of evidence or crime or of illegally imported goods." *Frank v. Maryland*, 359 U.S. 360, 363 (1959). The years around the American Revolution provided a time of protest against government excesses, both in the colonies and in England. In 1765, the case of *Entick v. Carrington*, 19 Howell's State Trials, col. 1029,

> announced the principle of English law which became part of the Bill of Rights and whose basic protection has become imbedded in the concept of due process of law. It was there decided that English law did not allow officers of the Crown to break into a citizen's home,

[4] In briefs totaling over 100 pages, the State of Minnesota, the amici 26 attorneys general, and the Solicitor General of the United States of America have not mentioned one word about the history and purposes of the Fourth Amendment or the intent of the framers of that amendment.

> under cover of a general executive warrant, to search for evidence of the utterance of libel.

Frank v. Maryland at 363. And in the colonies, the validity of the Writs of Assistance, which granted unlimited authority to revenue officers and customs officials to conduct searches, was challenged. In 1761,

> James Otis attacked the Writ of Assistance because its use placed "the liberty of every man in the hands of every petty officer." His powerful argument so impressed itself first on his audience and later on the people of all the Colonies that President Adams was in retrospect moved to say that "American Independence was then and there born."

Frank at 363. The history which gave rise to the words of the Fourth Amendment is a history of "abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution[.]" *United States v. Rabinowitz*, 339 U.S. 56 (1950). The framers of the Constitution were only too well aware that giving unlimited power to search homes and papers would result in increased criminal prosecutions, and they adamantly rejected the grant of broad, general, and uncontrolled authority to officers of the government. As this Court has said, "the security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

Against this backdrop, Minnesota's repeated argument that standing must be denied to those who are engaged in an unlawful activity falls flat. The makers of the Constitution were fully aware that the Fourth Amendment would protect all citizens, even those who

might be engaged in illegal activities such as the possession of contraband or smuggled goods. It is not that the framers of the Constitution wished to deny government officers effective tools of law enforcement; they simply recognized the huge costs to individual liberty of granting the government unlimited authority. As Justice Douglas wrote, the Fourth Amendment "marks the right of privacy as one of the unique values of our civilization and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause. . . . " *McDonald v. United States*, 335 U.S. 451, 453 (1948).[5] There is nothing in the history and purpose of the Fourth Amendment that supports the state's argument that respondents have no legitimate expectation of privacy because they are engaged in illegal acts.

2.

This Court's precedents strongly support the Minnesota Supreme Court's conclusion that respondents had a legitimate expectation of privacy as social guests in another person's home.

Since *Katz v. United States*, 389 U.S. 347 (1967), the "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims

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[5] Interestingly, *McDonald* involved police officers attempting to confirm their suspicion that illegal gambling activities were taking place in a boarding house by peering through a glass transom. This Court held that the Fourth Amendment required the police to get a warrant before peeking. *McDonald*, 335 U.S. at 454-55.

the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). A person's subjective expectation of privacy is legitimate if it is "one that society is prepared to recognize as reasonable[.]" *Id.*, at 143-144 n. 12, quoting *Katz* at 361 (Harlan, J., concurring).

This Court's decisions on the question of who may claim a legitimate expectation of privacy in the home of another has undergone some transformation since the first case directly confronting this issue, *Jones v. United States*, 362 U.S. 257 (1960), was decided. In that case, the court ruled that Jones could challenge the search of the apartment in which he was found because Jones was "legitimately on the premises." *Id.* at 267.[6] That standard was subsequently rejected by this court as too broad and was replaced by a focus on whether society is willing to accept a person's subjective manifestations of a right to privacy in the place in which the person found him or herself. *Rakas*, 439 U.S. at 142-148.

While *Rakas* changed the *Jones* test, this Court took pains to insist that it would have reached the same result under either test: "We do not question the conclusion in

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[6] Minnesota has argued that the "absurd conclusion" that society (at least constitutionally) recognizes as important the ability to engage in private (even illegal) activities is tantamount to re-establishing the legitimately on the premises standard of *Jones*. State of Minnesota's brief at 19-20. The Minnesota Supreme Court, and respondents, have done no such thing; they have simply recognized that a person's status on the premises is a relevant consideration in determining their legitimate expectations of privacy. The state's argument is simple: a search might be illegal, but no one could complain.

Jones that the defendant in that case suffered a violation of his personal Fourth Amendment rights if the search in question was unlawful[.]" *Rakas* at 141-142 ("We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place"). And, as the Court observed, it has "on numerous occasions pointed out that cars are not to be treated identically with houses or Apartments for Fourth Amendment purposes." 439 U.S. at 148.

In a post-*Rakas* case, this Court decided that one who was merely storing items at the home of another may, in fact, have standing to object to the search of the home of that other person; the case was remanded for the defendants to attempt to establish their privacy interest. *United States v. Salvucci*, 448 U.S. 83, 97 (1980). Most recently, this Court has decided that a person who has spent one night in a home – even though the purpose of that stay appears to have been to evade arrest – has a legitimate expectation of privacy in that home because society accepts that expectation of privacy as reasonable. *Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990).

Minnesota v. Olson left open the question of whether a social guest who has not demonstrated that he is an overnight guest is a person to whom the Fourth Amendment protections apply. In order to answer the question left open in that case, the State of Minnesota has relied on a series of cases which simply do not involve, or do not discuss, whether social guests may claim a legitimate expectation of privacy in the home of another person. In

United States v. Salvucci, 448 U.S. 83 (1980), this Court remanded for the trial court to decide whether a defendant could show a legitimate expectation of privacy in his mother's home; it did not rule that Salvucci has no such expectation. In *Rakas v. Illinois*, 439 U.S. 128 (1978), this Court found that an automobile passenger had no legitimate expectation of privacy in an item left in another person's car; it said nothing about privacy in the home.[7] And, in *Brown v. United States*, 411 U.S. 223 (1973), this Court decided that defendants, who were in another state at the time of the search, had no standing to object to evidence seized from a store; *Brown* said nothing about privacy in a person's home. The state simply ignores the crucial significance a home plays in any discussion of Fourth Amendment protections. "Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 587 (1980), quoting *Dorman v. United States*, 140 U.S.App.D.C. 313, 317, 435 F.2d 385 (1970). The state's attempt to equate the privacy interest of a passenger in a car or one who resides in another state during the search of a store to the privacy interest of a social guest behind closed blinds and doors ignores the core privacy right we retain in our dwellings.

In practice, then, this Court is very aware that the history and purpose of the Fourth Amendment support

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[7] As the concurrence in *Rakas* notes, "We have repeatedly recognized that [the expectation of privacy] in 'an automobile . . . [is] significantly different from the traditional expectation of privacy and freedom in one's residence.' " 439 U.S. at 154 (Powell, J., concurring), quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

special protections against invasions of the home by the state. In practice, this Court has also extended those protections to house guests of homeowners, recognizing that the relationship of the houseguest to the homeowner is an important one that involves privacy interests for both. *Olson* at 98-99. Respondents were in the home of another person for several hours. They not only shared the homeowner's expectation that their privacy would not be invaded by a police officer, they also had a belief, sanctioned by society, that their privacy would actually be protected by the homeowner.[8]

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[8] The hypothetical posed by the Solicitor General in support of its argument that one must stay overnight before being granted a privacy interest sets up a straw man. The Solicitor General concludes that "one who merely visits the home of another and does not stay there overnight ordinarily arrives without any expectations regarding the admission or exclusion of others. Instead, it is commonly accepted that hosts are free to admit or exclude others as they see fit. For example, one invited to dinner party at another's home would hardly be surprised to find additional guests seated at the table, even though this would render the occasion substantially less private." Solicitor General's brief at 17-18. Aside from the fact that this same argument was rejected in *Olson*, it misses the point; people do, in fact, arrive at the homes of others with *some* expectations about the admission or exclusion of others. The point is not that the dinner party is "accessible to" some other person at some time, "but that it is a temporarily private place whose momentary occupants' expectations of freedom are recognized as reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). We commonly expect that the homeowner will admit others to the dinner, but we to do not expect that the police will invade the privacy which the host has afforded to us through his or her invitation.

This Court has summarized the social customs and norms supporting a right to privacy in the home of another in terms equally applicable to this case:

> To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in other's homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town.

Olson at 98. Similarly, to hold that social guests have a legitimate expectation of privacy in the host's home merely recognizes many of the same expectations of privacy enunciated in *Olson*. Being a guest in another's home is a longstanding social custom that serves functions recognized as valuable by society; one need look no further than family gatherings for Thanksgiving meals to recognize the important social function having guests into one's home represents. We are guests in other's homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town. As *Olson* stated: "We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home." *Id.*

Even before the *Olson* decision, Professor LaFave outlined its rationale: "A person who is a visitor in the residence of another certainly shares with the resident a

justified expectation of privacy in that place against unlawful police entry of that place which intrudes upon his solitude, privacy, and freedom." 4 W. LaFave, *Search and Seizure*, § 11.3(b), p. 298 (2nd Ed. 1987). This Court's decision in *Olson* has only strengthened the logic behind Professor LaFave's earlier conclusion:

> [I]t is fair to say that the *Olson* decision lends considerable support to the claim that shorter-term guests also have standing. For one thing, by rejecting the contention that a visitor must have "complete dominion and control" the *Olson* court undercut the basis on which many lower courts found shorter-term guests to lack standing. For another, despite the court's emphasis upon the special privacy concerns of guest while they "are asleep" and "cannot monitor [their] own safety or the security of their belongings," that consideration seems largely irrelevant in the *Olson* case itself, where the objected-to police conduct occurred at three o'clock in the afternoon. That is, Olson's 3 p.m. legitimate expectation – in the words of the Court, that "he and his possessions will not be disturbed by anyone but his host and those his host allows inside" – would exist whether he arrived the night before, only that morning, or, indeed, only shortly before the police entry. Moreover, visiting the house of another *without* an overnight stay is (again in the words of *Olson*) likewise "a longstanding social custom that serves functions recognized as valuable by society" and an event during which "hosts will more likely than not respect the privacy interests of their guests."

5 W. LaFave *Search and Seizure* § 11.3(b), p. 137 (3d Ed. 1996) (emphasis in original; footnotes omitted).

Respondents were in an apartment as social guests of the apartment's leaseholder. The door was shut behind them, and the blinds were closed tightly enough so that one could not see through them without engaging in the criminal act of "Interference with Privacy." *See* argument II. They were entitled to assume that their privacy would not be violated by a peeping Tom, even if he was also a police officer. Their expectation of privacy was one which society recognizes as reasonable. They are therefore entitled to object to the police conduct in this case.

II.

THE MINNESOTA SUPREME COURT WAS CORRECT WHEN IT FOUND THAT OFFICER THIELEN, BY LEAVING THE SIDEWALK, WALKING ACROSS THE GRASS AND STARING INTO THE APARTMENT WINDOW FROM A DISTANCE OF TWELVE INCHES, VIOLATED THE FOURTH AMENDMENT.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." At its core, the Fourth Amendment prohibits government intrusions into an individual's home or dwelling. *Payton v. New York*, 445 U.S. 573, 587 (1980).

Assuming that respondents have a reasonable expectation of privacy in the home they were visiting, the issue becomes whether Officer Thielen's observations into the apartment they were visiting constituted a "search" within the meaning of the Fourth Amendment. *See United*

States v. Dionisio, 410 U.S. 1, 15 (1973) (Fourth Amendment only applies to searches). Officer Thielen "left the sidewalk, walked across the grass, climbed over the bushes, placed his face within 12-18 inches of the window and peered through a small gap between the blinds." *State v. Carter*, 569 N.W.2d 169, 178 (Minn. 1997). If Thielen's actions constituted a search, then he violated the Fourth Amendment because he conducted the search without probable cause[9] and without a warrant. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Aguilar v. Texas*, 378 U.S. 108 (1964).

In determining whether police action amounts to a search, the Court's "lodestar" is *Katz v. United States*. *Smith v. Maryland*, 442 U.S. 735, 739 (1979). In *Katz*, this Court held that the Fourth Amendment "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351-353 (1979). In a concurring opinion, Justice Harlan fashioned a two-part test to determine whether a search occurred: "First, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." *Katz v. United States*, 389 U.S. 346, 361 (1967) (Harlan, J. concurring). Subsequent cases have adopted Justice Harlan's two-part analysis. *See, e.g., California v. Ciraolo*, 476 U.S. 207 (1986). Thus, if an individual exhibits a subjective expectation of privacy that society is willing to

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[9] The State conceded that Thielen did not have probable cause before peering into the window. *State v. Carter*, 569 N.W.2d at 178. The State correctly conceded that Thielen did not have probable cause because an anonymous tip by itself cannot constitute probable cause. *Aguilar v. Texas*, 378 U.S. 108 (1974).

recognize as reasonable, police intrusion into that privacy constitutes a Fourth Amendment search.

A.

Respondents exhibited a subjective expectation of privacy by closing the blinds of the apartment as far as they would go.

The first inquiry is whether the individual has "exhibited an actual (subjective) expectation of privacy." *Katz v. United States*, 389 U.S. at 361 (1967) (Harlan, J. concurring). In other words, whether "the individual has shown that he seeks to preserve something as private." *Smith v. Maryland*, 442 U.S. 736, 740 (1979) (citing *Katz v. United States*, 389 U.S. at 361).

Respondents exhibited a subjective expectation of privacy by closing the apartment's blinds. As noted previously, the Minnesota Supreme Court held that respondents had a subjective expectation of privacy; respondents were "inside the apartment of an acquaintance with the doors shut and the blinds drawn." *State v. Carter*, 569 N.W.2d at 174. *Compare Katz v. United States*, 389 U.S. at 352 (defendant demonstrated a subjective expectation of privacy in his phone call by entering the phone booth and shutting the door behind him) and *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (defendant "clearly" manifested a subjective expectation of privacy by erecting a six-foot outer fence and a ten-foot inner fence) *with Smith v. Maryland*, 442 U.S. 735 (1979) (defendant did not have a subjective expectation of privacy in the phone numbers he dialed where the numbers must be

disclosed to the telephone company and the company recorded the numbers for billing purposes).

B.

Respondents' expectation of privacy was reasonable considering that Thielen used "extraordinary measures" to peer into a private residence.

The second part of the *Katz* test is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as reasonable." *Katz v. United States*, 389 U.S. at 361 (Harlan, J. concurring). "[T]he correct inquiry is whether the government's intrusion infringes upon personal and societal values protected by the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170, 182-183 (1984). In determining whether the individual's expectation is "reasonable," the Court considers a number of factors. *Oliver v. United States*, 466 U.S. at 178.

The most important factor is the place where the search occurs. Although the Fourth Amendment protects people, not places, the type of protection the Fourth Amendment provides "requires reference to a 'place.'" *Katz v. United States*, 389 U.S. at 361 (Harlan, J. concurring). "[C]ertain areas deserve the most scrupulous protection from government invasion." *Oliver v. United States*, 466 U.S. at 178. The specific language of the Fourth Amendment, "[t]he right of the people to be secure in their . . . houses . . . shall not be violated," "establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his

own home and there be free from unreasonable government intrusions." *Payton v. New York*, 445 U.S. 573, 589-590 (1979), quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961).

In this case, Officer Theilen looked through a gap in the blinds directly into the apartment, thereby invading a home – the area that deserves "the most scrupulous protection" from government invasion. *Id.* Although the officer did not physically intrude into the residence, the reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Katz v. United States*, 389 U.S. at 353. Indeed, the Fourth Amendment applies

> to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, person liberty and private property.

Boyd v. United States, 116 U.S. 616, 630 (1886).

The three cases relied on by State and its amici, *Florida v. Riley*, 488 U.S. 445 (1989), *United States v. Dunn*, 480 U.S. 294 (1987) and *California v. Ciraolo*, 476 U.S. 207 (1986), did not involve a search of a home. Instead, the Court focused on the lack of privacy interest in a greenhouse, *Florida v. Riley*, 488 U.S. at 450-451, a barn, *United States v. Dunn*, 480 U.S. at 302-303, and a garden, *California v. Ciraolo*, 476 U.S. at 214.

In this case, the police did not invade a garden, barn or greenhouse; the officer invaded a private residence. The difference is substantial: "[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." *United States v. Karo*, 468 U.S. 705, 714-15 (1984).

A second factor to be considered in determining whether an individual's expectation of privacy is "reasonable" is the manner in which the police acted. It is not necessarily a violation of the Fourth Amendment for an officer to see or hear something that occurs within a dwelling. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. **But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.**" *Katz v. United States*, 389 U.S. at 351 (emphasis added).

> It is one thing to assert that an occupant cannot claim a justified expectation of privacy as to activities within his dwelling when that conduct is carried out in such a manner as to be readily seen or heard by neighbors or the passing public. It is quite another to declare that citizens cannot feel safe in leaving their windows uncurtained to the skies or in otherwise failing to seal off each and every aperture in their dwellings. And thus when police surveillance takes place at a position which cannot be called a public vantage point, i.e., when the police – though not trespassing upon the defendant's curtilage – resort to the extraordinary step of positioning themselves where neither neighbors nor the general public would ordinarily be expected to be, the observation or overhearing of what is occurring within a dwelling constitutes a Fourth Amendment search. This is really what *Katz* is all about.

1 Wayne R. LaFave, *Search and Seizure*, § 2.3(c) at 482 (3rd Ed. 1996) (citations and internal quotations omitted).

In this case, a unanimous[10] Minnesota Supreme Court held that Thielen's conduct was a "search" because he took "extraordinary measures" to look inside respondent's apartment. "[T]he fact that Thielen left the sidewalk, walked across the bushes, placed his face within 12 to 18 inches of the window and peered through a small gap between the blinds **makes it clear that he took extraordinary measures** to enable himself to view the inside of a private dwelling." *State v. Carter*, 569 N.W.2d at 178 (emphasis added).

In fact, Thielen's "extraordinary measures" violated a Minnesota statute prohibiting "interference with privacy." Minn. Stat. § 609.746, subd.1(a) provides that a person is guilty of a misdemeanor offense if he:

(1) enters upon another's property;

---

[10] Petitioner incorrectly refers to the "majority Minnesota Supreme Court" with regard to whether Thielen conducted a search. Petitioner's Brief, p. 33. Although the dissenters believed that respondents did not have standing to challenge the search, they agreed that the police officer's actions constituted a "search" that violated the Fourth Amendment. *State v. Carter*, 569 N.W.2d at 179 (Stringer, J. dissenting).

> (2) surreptitiously gazes, stares, or peeps in the window or any other aperture of a house or place of dwelling of another; and
>
> (3) does so with the intent to intrude upon or interfere with the privacy of a member of the household.[11]

Based on Thielen's extraordinary measures, not to mention his unlawful conduct, the Minnesota Supreme Court correctly determined that "[i]f we conclude that his actions constituted anything other than a search, it is difficult to imagine when we would be able to say that an activity short of an actual physical intrusion of a dwelling would violate a person's expectation of privacy." *State v. Carter*, 569 N.W.2d at 178. *See also State v. Harris*, 919 S.W.2d 619 (Tenn. Crim. App. 1995) (although whatever officers see from vantage point along walkway is not constitutionally protected, police violated Fourth Amendment by walking around exterior of building and gazing in window); *State v. Wooding*, 449 S.E.2d 760 (N.C. Ct. App. 1994) (police officer violated Fourth Amendment by looking into back window of an apartment through three-to-four inch opening in drawn curtains); *Olivera v. State*, 315 So. 2d 487 (Fla. Dist. Ct. App. 1975) (in leaving sidewalk to stand on lawn next to window, police officer violated Fourth Amendment); *Lorenzana v. Superior Court of Los Angeles County*, 9 Cal.3d 626, 108 Cal. Rptr. 585, 511 P.2d 33 (1973) (police violated Fourth Amendment by

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[11] This law applies to police officers. *See* Minn. Stat. § 609.746, subd. 1(f) (only certain paragraphs, (b) and (c), do not apply to police officers).

leaving the driveway and peering through a two-inch gap in a drawn shade).

Despite Thielen's "extraordinary measures," the State and its amici claim that, because the officer was "in a place he was allowed to be," the officer was not conducting a search. *See, e.g.*, Brief of 26 States, p. 18. Contrary to the State's claim, the officer was not in a place he was allowed to be.

Thielen was clearly on the apartment's curtilage. Although the State now claims that Thielen peered into the apartment "from a common area outside the curtilage," State's brief, p. 27, the State conceded in its brief to the Minnesota Supreme Court that "Officer's Thielen's observations were from an area adjacent to the apartment **which may be classified as occurring within the 'curtilage' of the residence**." Respondent's brief to the Minnesota Supreme Court, p. 8 (emphasis added). This court will generally not address arguments that were not presented to the State's highest court. *Riggins v. Nevada*, 504 U.S. 127, 133 (1992).

Respondent was correct to concede that Thielen was standing on the curtilage.

> [T]he curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.

California v. Ciraolo, 476 U.S. 207, 212-13 (1986) (citations omitted). A home's curtilage, although outside the home literally and figuratively, is nonetheless protected by the Fourth Amendment. *Oliver v. United States*, 466 U.S. 170, 180 (1984) (individual has expectation of privacy in the area immediately outside the home).

Here, Thielen was standing right in front of the window of the apartment, twelve-to-eighteen inches from the window; therefore, he was on the curtilage of the apartment. Because Thielen was standing on the curtilage of the apartment and peering into the residence, he was conducting a search. *See, e.g., United States v. Blount*, 98 F.3d 1489, 1495 (5th Cir. 1996) ("when a police officer walks into partially fenced backyard of a residential dwelling, using a passage not open to the general public, and places his face within inches of a small opening in an almost completely covered rear window to look into the house and its inhabitants, the officer has performed a search within the meaning of the Fourth Amendment."); *Brock v. United States*, 223 F.2d 681, 685 (5th Cir. 1955) ("Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his right to be left alone as guaranteed by the Fourth Amendment."). *Compare California v. Ciraolo*, 476 U.S. 207 (police may look **into** curtilage from publicly navigable airspace in a physically non-intrusive manner).

In making its claim that Thielen had a right to stand directly in front of the apartment window, the State relies mainly on the fact that the search occurred in an apartment rather than a single-family home. Although under

some circumstances those who reside in a multiple-occupancy dwelling may have a lesser expectation of privacy than those who reside in single unit dwellings, both apartment dwellers and private homeowners deserve the same protection from window-peepers. *See Lanza v. New York*, 370 U.S. 139, 143 (1962) ("A hotel room, in the eyes of the Fourth Amendment, may become a person's 'house,' and so, of course, may an apartment.").

While it is true that the curtil ge of an apartment building may be open to the residents of the building, it does not follow that the residents of the apartment building expect that their neighbors, or the police, will stand in front of their windows and peer through closed blinds. Thus, in *Katz*, this court specifically stated that what a person "seeks to preserve as private, **even in an area accessible to the public**, may be constitutionally protected." *Katz v. United States*, 389 U.S. at 351 (emphasis added).

Nonetheless, in a stunning repudiation of the values underlying the Fourth Amendment, the State claims that the police are entitled to enter the curtilage and peer into the window of any multiple-occupancy dwelling – from duplexes to giant hotels, even though the police cannot do the same to single-family houses. The Fourth Amendment does not countenance, and this court should not recognize, such a distinction. *See, e.g., United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976) (tenant in an apartment building has a reasonable expectation of privacy in the common areas of the building not open to the public; officer's entry into common area violated tenant's Fourth Amendment rights); *Olivera v. State*, 315 So. 2d 487 (Fla. Dist. Ct. App. 1975) (tenant could reasonably expect that

no one would observe or hear his activities through his bedroom window; therefore, by leaving sidewalk to stand on lawn next to apartment window, police officer violated Fourth Amendment); *Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974) (although defendant shared his backyard with other tenants of the apartment building and therefore could not enjoy as much exclusivity as the backyard of a single-family dwelling, the backyard was sufficiently removed and private so that he could reasonably expect privacy).

The State and its amici also make much of the fact that Thielen's observations were neither aided or enhanced. *See, e.g.*, Brief of 26 States, p. 23. This is true; it is also irrelevant. Since Thielen should not have been peering through the closed blinds from the curtilage of the apartment, it hardly matters that he did so without binoculars.

What is important is that Thielen stood directly in front of the window and peered into the apartment for fifteen minutes. A brief glance at a window is far different than standing twelve inches from the window and staring into the apartment.

The law in Minnesota that prohibits interference with property, Minn. Stat. § 609.746, does not prohibit glancing at a window. But it does prohibit surreptitiously gazing, staring, or peeping into the window of another person's dwelling. Thus, while respondents may not "reasonably" expect privacy from people walking by the apartment and glancing at the window, respondents had a more than reasonable expectation that no one would stand twelve inches from the window and peer through a small

gap in the blinds for fifteen minutes. *See Minnesota v. Dickerson*, 508 U.S. 366 (1993) (although officer could justifiably discover contraband through sense of touch, officer could not continue to explore object he discovered after he concluded that it was not a weapon).

The resolution of this issue is complicated somewhat by what the officer saw when he peered through the window, that is, evidence of a crime. The Fourth Amendment, however, protects more than the guilty. "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona v. Hicks*, 480 U.S. 321, 329 (1987). A quarter-century ago, Professor Amsterdam recognized the fundamental flaw in the State's argument:

> But, unless the Fourth Amendment controls tom-peeping and subjects it to a requirement of antecedent cause to believe that what is inside any particular window is indeed criminal, police may look through windows and observe a thousand innocent acts for every guilty act they spy out. Should we say that prospect is not alarming because the innocent homeowner need not fear that he will get caught doing anything wrong? The Fourth Amendment protects not only against incrimination, but against invasions of privacy – or rather, as *Katz* holds, of the right to maintain privacy without giving up too much freedom as the cost of privacy. The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not.

Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 402-403 (1974). Here, the State argues that, **in spite of closed blinds**, homeowners must still live under "pain of surveillance."

This Court must preserve the sanctity of the home, the core value of the Fourth Amendment, for everyone. This Court should hold that the drawing of blinds in an apartment building manifests a subjective expectation of privacy that society recognizes as reasonable. And thus, the Court must conclude that when Thielen peered through the closed blinds, he conducted a search that violated the Fourth Amendment.

By closing the apartment blinds, respondents exhibited a subjective expectation of privacy that society must recognize as reasonable. Thielen invaded this expectation, and conducted a search, by standing on the curtilage, off the sidewalk, twelve inches from the window and peering into the apartment. Because Thielen had neither a warrant nor probable cause, he violated the Fourth Amendment.

CONCLUSION

The Minnesota Supreme Court was correct in holding that respondents, as social guests in the home of another person they were visiting, had a reasonable expectation of privacy in that home. The officer's window-peeking violated that privacy, and amounted to a search under the Fourth Amendment to the United States Constitution. The opinion of the Minnesota Supreme Court must be affirmed.

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No. 97-1147

In the

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA,

Petitioner,

vs.

WAYNE THOMAS CARTER, AND
MELVIN JOHNS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

A. Respondents and their supporters have erroneously generalized the State of Minnesota's argument concerning standing.

Respondents and their supporters have defined the State of Minnesota's position as one that would automatically deny a guest's ability to object to a search of a host's residence under the Fourth Amendment if the guest is engaged in unlawful activity in the residence. Using this erroneous generalization respondents and their supporters argue that the State's position is inconsistent with the history, purpose and application of the Fourth Amendment by this Court. Such generalizations and arguments should be rejected.

In framing its argument as to the standing issue, the State has primarily relied upon the following premises:

- Defendants must identify a personal privacy interest in the area searched — protected by the Fourth Amendment — and not the privacy interests of co-conspirators or third parties.

- In determining the legitimacy of a defendant's privacy interests under the Fourth Amendment, courts should examine the totality of the circumstances.

- A defendant's physical presence and common task with one in lawful possession merely demonstrates that the defendant is legitimately on the premises.

- Being legitimately on the premises, in and of itself, is insufficient to establish a protected privacy interest under the Fourth Amendment.

- Under the totality of the circumstances analysis, the nature of a defendant's common task with one in lawful possession of a residence is a relevant consideration.

Using these premises, it is the position of the State that Carter and Johns have failed to establish a constitutionally protected privacy interest in the apartment of their co-conspirator.

Respondents' attempt to establish a protected privacy interest by defining themselves as "social guests" in the home of their co-conspirator lacks factual support. Carter and Johns were not using the apartment to engage in social activities normally associated with a dwelling. Instead they were using the apartment as a place of business. Their sole purpose for being present was to package drugs for illegal distribution. Every court that examined the factual record has reached this same conclusion. Seeking constitutional protection of their unlawful activity under the guise that at the time of the search that they were social guests constitutes a distortion of the facts which must be rejected by this Court.

The State acknowledges that warrantless searches of homes should be subjected to close scrutiny under the Fourth Amendment. Persons, however, are not always invited into homes for lawful purposes or for reasons which serve societal interests. Because the Fourth Amendment was created to protect legitimate privacy interests and not illegal activity, unlawful acts cannot be used to create a legitimate expectation of privacy under the Fourth Amendment. Engaging in an illegal common task in another's home with the homeowner does not, in and of itself, confer standing to the guest under the Fourth Amendment — there must exist evidence that the guest was using his host's home for those intimate activities normally associated with a dwelling.

To allow Carter and Johns to establish a constitutionally protected privacy interest on the mere fact they were invitees into the home of their co-conspirator, without an examination

into the nature of the activity, in essence allows them to vicariously assert the privacy interests of their host. To accept respondents' argument will automatically grant standing to any invitee into a residence. The purpose for an invitee's presence, the length of time of the stay, or the invitee's exercise of dominion or control over the residence, and other considerations will become irrelevant. Under the respondents' argument, a defendant who is invited into the residence by the homeowner to commit arson so that the homeowner can fraudulently collect on the insurance policy has the same constitutionally protected privacy interest as an overnight guest or others who are present for traditional social activities.

Defendants who seek a protected privacy interest based only on the fact that they were present at the time of a search and engaged in an illegal activity with one in lawful possession do not have standing to object to a search of the premises under the Fourth Amendment. Although criminal conduct will not destroy an established legitimate expectation of privacy, such acts cannot be used to create a constitutionally protected privacy interest.

B. Respondents and their supporters mischaracterize the State of Minnesota's position pertaining to whether Officer Thielen's conduct constituted a search under the Fourth Amendment.

Respondents and their supporters imply that the State is arguing that because Officer Thielen was "in a place where he was allowed to be," this is dispositive of the search issue. See Respondents' Brief on the Merits, p. 29, and Brief Amicus Curiae of the American Civil Liberties Union, et al., p. 21. This is not the position of the State of Minnesota. A search may occur even if an officer is in a legitimate location at the time of his observation of the interior of a residence. For

example, a search may occur if electronic listening devices are used or some other form of enhancement of one's natural senses is utilized. *Katz v. United States*, 389 U.S. 347 , 88 S.Ct. 507 (1967).

Contrary to Respondents' implications, the State's argument is based upon the long-standing two-pronged test as to whether a search has occurred: (1) the location of the officer at the time of the viewing; and (2) the precise manner in which the view is achieved. See Brief of 26 States As Amici Curiae In Support of Petitioner, pp. 13-14. Respondents wish this Court to ignore this long-standing test, as the Minnesota Supreme Court did, and focus upon the measures Officer Thielen took before making his visual observations into the apartment. By focusing upon how the officer got to the location and not what he did when he arrived there, the Minnesota Supreme Court not only ignored the first prong of the test in its entirety, but also totally misconstrued the second prong of the test as well. The second prong of this test was not intended to involve an analysis of how the officer obtained his vantage point, but rather what methods he used to make his observation. An officer is entitled to make non-enhanced observations of criminal activity from a common area outside the curtilage of an apartment. The effect of the Minnesota Supreme Court ruling is that an officer could never walk up to a residence and look through the window even if he were outside the curtilage and in a public or common area. If this logic is allowed to stand, it will overrule long-established precedents of this Court as to whether a search occurred. See *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735 (1984); *Caliornia v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1089 (1986); *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134 (1987); and *Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693 (1989).

C. Respondents' reliance upon Minnesota's invasion of privacy law is inappropriate.

1. State privacy laws are not dispositive of Fourth Amendment issues.

Carter and Johns argue that Officer Thielen violated Minnesota's invasion of privacy statute when he approached the apartment and looked inside the window. Respondents' Brief On the Merits, at p. 27, citing Minn. Stat. § 609.746, subd.1(a). This Court has made it clear that state privacy and trespass laws are not dispositive of Fourth Amendment issues. *California v. Greenwood,* 486 U.S. 35, 43, 108 S.Ct. 1625, 1630 (1988). To hold otherwise would allow states to control the determination of constitutional privacy interests through statutory definition and subsequent state court interpretation of privacy or trespass laws. This Court should also recognize that no Minnesota court reviewing this case ever made a finding that the investigating officer violated Minnesota's privacy statute. This Court should not now engage itself in an interpretation of state statutes and their application to the instant case.

2. Officer Thielen did not violate Minnesota invasion of privacy statutes when he looked into the window of the apartment.

Respondents' argument as to whether Officer Thielen violated state privacy laws ignores the fact that Officer Thielen made his observations from an area common to others. Officer Thielen did not cross onto the apartment's curtilage. After an exhaustive examination of relevant facts, the trial court specifically so held. *Order Pursuant to Omnibus Hearing, (J.A., infra, pp. E10-11).* The Minnesota Supreme Court expressly declined to reverse this factual

finding. As the Minnesota Supreme Court noted, "It is at least arguable that Thielen's position just outside the apartment window was a common area and not the curtilage of the apartment." *State v. Carter*, 569 N.W.2d 169, 177 (1997) n.10 (J.A., infra., p. A20). Therefore, Officer Thielen did not enter the property of another which is a necessary prerequisite for the application of this statute. See, Minn. Stat. § 609.746, subd.1(a)(1).

Additionally, Officer Thielen is charged with the responsibility of preventing and detecting crime and the enforcement of the criminal statutes. Minn. Stat. § 626.84, subd.1(c). When Officer Thielen approached the window he was investigating a recent report of illegal drug activity inside the apartment. Because Officer Thielen was merely fulfilling his duty as a licensed police officer, he was not in violation of any state privacy laws. See, *State v. Smith*, 386 N.W.2d 403, 405 (Minn.App.1986), review denied July 16, 1986.

D. The State of Minnesota did not concede in its written brief to the Minnesota Supreme Court that Officer Thielen was standing within the curtilage of the apartment.

Respondents claim that the State, in its brief to the Minnesota Supreme Court, conceded that Officer Thielen's observations were from an area within the curtilage of the apartment and as such this Court should not address this issue. Respondents' Brief on the Merits, p. 29. The State of Minnesota made no such concession.

Carter and Johns' position is a clear misrepresentation to this Court as it is taken completely out of context. The sentence quoted by respondents is in that portion of the argument section of the State of Minnesota's brief to the Minnesota Supreme Court that was dedicated to the standing issue. Its clear purpose was to indicate that in order for Carter

and Johns to prevail they must establish a legitimate expectation of privacy not only within the apartment, but within the curtilage of the apartment as well. Any misconception as to whether the State conceded that Officer Thielen was within the curtilage of the apartment is clarified in the second argument of the State's brief to the Minnesota Supreme Court. The second argument was entitled, "B. Officer Thielen did not violate Appellant's constitutional right against unreasonable searches and seizures as his observations of Appellant's actions were in plain view and *made from a location outside the curtilage of the apartment.*" (Emphasis added.) Respondents' brief to the Minnesota Supreme Court, p. 10. In this section of the prior brief, the state argued at length the very issue respondents' erroneously claim the state waived. Therefore, Carter and Johns' allegation that the state previously conceded that Officer Thielen was within the curtilage of the apartment should be summarily rejected as an improper attempt to limit the review of this Court.

CONCLUSION

For the foregoing reasons and those stated in Petitioner's opening brief, the judgment of the Minnesota Supreme Court should be reversed.

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No. 97-1147

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MINNESOTA, PETITIONER

v.

WAYNE THOMAS CARTER

ON WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a person whose sole connection to an apartment is that he packaged drugs there as an invitee of its lessee for about two and one half hours has a reasonable expectation of privacy in the apartment that permits him to claim the protection of the Fourth Amendment.

2. Whether a police officer's observation of the interior of an apartment from a grassy common area immediately outside the apartment, through gaps in the apartment's venetian blinds, constitutes a "search" within the meaning of the Fourth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1147

STATE OF MINNESOTA, PETITIONER

v.

WAYNE THOMAS CARTER

ON WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents two questions: First, whether a person who has no connection to an apartment other than having used it, for approximately two and one half hours, to package illegal narcotics as an invitee of the lessee, has a legitimate expectation of privacy in the apartment within the meaning of the Fourth Amendment; and second, whether it is a Fourth Amendment "search" for a law enforcement officer to observe narcotics activities within an apartment from a grassy, common area immediately outside the apartment's window. The United States has a law enforcement interest in the resolution of both questions.

STATEMENT

After trial in Minnesota District Court for the County of Dakota, respondents Wayne Thomas Carter and Melvin Johns were convicted of conspiracy to possess cocaine with intent to sell it and aiding and abetting the possession of cocaine, in violation of Minn. Stat. Ann. §§ 152.021, subdiv. 1(1), 152.021, subdiv. 2(1), and 609.05 (West 1989). The Minnesota Court of Appeals affirmed the convictions, and the Supreme Court of the State of Minnesota reversed.

1. At approximately 8 p.m. on May 15, 1994, Officer Jim Thielen was approached by an individual who said that he had been walking by the window of an apartment nearby and had seen several people bagging white powder inside. J.A. A8, E1-E2, G7-G9. The individual also stated that a blue, four-door Cadillac, with Illinois license plate number SGD-896, was being used by the apartment's occupants. J.A. A8, E2, G9-G10.

Thielen went to the apartment that the individual had described. Although the venetian blinds covering the windows were drawn, there were gaps in the blinds, and the lights inside the apartment were on. J.A. A9, E2, G12-G13, I6, I9-I10.[1] Thielen left the common sidewalk and walked across a grassy area, which was common to all tenants in the apartment complex, to a point about 12 to 18 inches from the window. J.A. E2, E10. From that location, Thielen could see the

[1] A venetian blind is a "blind (capable of being raised or lowered) having numerous thin parallel slats placed horizontally one above another which are capable of being set simultaneously at any desired angle to admit varying amounts of light or air, or of being made to overlap one another to exclude light, etc." *Webster's New International Dictionary of the English Language* 2827 (2d ed. Unabridged 1958).

occupants of the apartment through the gaps in the blinds. J.A. A9, E2, E10, E13, G12-G13. Thielen spent about 15 minutes watching as respondents and a woman, who was later identified as Kimberly Thompson (the apartment's only lessee), sat at a kitchen table and bagged what appeared to be narcotics. J.A. A9, E2-E3, G13-G14.[2]

Thielen then left to meet with the individual who had told him about respondents' activities and to arrange for a search warrant. Before the warrant was obtained, however, another police officer saw respondents get into the Cadillac the informant had described. The police stopped the car and asked respondents to get out; the officers then saw, in plain view on the floor of the car, a black zippered pouch and a handgun. After respondents were arrested, the police obtained a search warrant and searched both the car and the zippered case; they found (among other things) scales, pagers, and 40 grams of a white mixture containing cocaine. J.A. A9, E3, E12, G15-G23.

2. Before trial, respondents moved to suppress evidence on the ground that Thielen's initial observation of the apartment was an unlawful search. The Minnesota District Court for Dakota County denied the motion. J.A. E1-E17.

First, the court concluded that respondents lacked "standing" because they had no "legitimate expectation of privacy" in the apartment. J.A. E7-E8. Rely-

[2] Respondent Carter was measuring out small quantities of a white powder and passing them to respondent Johns. Johns, who was wearing bedroom slippers, would in turn put the powder in a plastic bag and pass it to Thompson. Thompson would then cut off the ends of the bag and put it on a pile on the kitchen table. J.A. A9, E2, G13-G14.

ing on this Court's decisions in *Rakas* v. *Illinois*, 439 U.S. 128 (1978), and *Minnesota* v. *Olson*, 495 U.S. 91 (1990), the court acknowledged that an individual may have a legitimate expectation of privacy in the home of another. J.A. E7-E8. In *Olson*, the trial court noted, this Court held that an overnight guest has a legitimate expectation of privacy in his host's home. Here, however, respondents presented no evidence that their status "in Ms. Thompson's apartment was similar to Olson or that [their] status was one that was envisioned to be protected under the *Olson* rationale." J.A. E8. "No evidence was presented at the hearing" that respondents "had lived at this apartment long term, w[ere] overnight guest[s], or w[ere] related to the leaseholder." J.A. E7. Instead, "[t]he only evidence presented showed" that respondents were residents of another city and that they "had been at the apartment for a period of a few hours on May 15, 1994, during the police observation." *Ibid.* "Without more evidence," the court explained, it could not "conclude that [respondents'] expectation of privacy in the apartment was based upon 'understandings that are recognized and permitted by society,' and therefore legitimate." J.A. E8.

The court also concluded that, even setting aside respondents' lack of a protected privacy interest in the apartment, Thielen's observations did not constitute a search within the meaning of the Fourth Amendment because they "were made from a common area opened to the public and other occupants of the apartment complex" and "were limited to articles in plain sight" through "gaps in the blinds." J.A. E9. Although the grassy area from which Thielen made his observations was 12 to 18 inches from the window, the court explained, it did not constitute "curtilage"

of the apartment but rather was "common to all residents" of the apartment building. J.A. E10. There were no fences, trees, or bushes that might block public entry into the area where Thielen stood, or otherwise prevent public viewing through the window. *Ibid.* To the contrary, the photographic exhibits showed that "the public had access to the area directly in front of Ms. Thompson's windows to store bicycles," and would "leave the common sidewalk * * * to deposit their bicycles" near the area where Thielen stood. *Ibid*; see J.A. I2, I4. Because Thielen was standing in a common area, open to the public, rather than in the curtilage, the court concluded that "the officer's observations did not constitute a search." J.A. E12.

3. Respondents appealed, and separate panels of the Minnesota Court of Appeals affirmed. As to Carter, the appellate court agreed with the trial court that he lacked the legitimate expectation of privacy in the apartment required to support a Fourth Amendment challenge. J.A. C4-C6. As to Johns, the court found no need to address "standing," because it concluded that Thielen's observations did not violate the Fourth Amendment since they were made from a common area open to the public. J.A. D3-D5.

4. Respondents appealed and the Minnesota Supreme Court reversed. The court first resolved Carter's appeal, J.A. A1-A28, and then relied on its reasoning to reverse the judgment in Johns' case, J.A. B1.

a. In reversing Carter's conviction, the court stated that whether an individual has a legitimate expectation of privacy to support a Fourth Amendment claim depends on "the nature of the relationship between the property possessor and the person

alleging the privacy interest in the property. If the relationship is the type that society recognizes as valuable, then we will find standing." J.A. A18. In this case, the court concluded, the facts "probably fail to establish" that Carter was Thompson's "guest" in the apartment. J.A. A17. But, the court concluded, society would still respect as reasonable Carter's expectation of privacy. *Ibid.* The court explained that Carter was on the premises with the leaseholder's permission; that he remained there for two and one half hours working on a joint task; and that society recognizes as "valuable" the right of property owners or leaseholders to engage in joint tasks with guests, "be it legal or illegal activity." J.A. A17-A18. Thus, "[a]lthough society does not recognize as valuable the task of bagging cocaine," the court found Carter's presence in the apartment to be within the zone of Fourth Amendment protection. J.A. A18.

b. The court then held that Thielen's observations of the activities in the apartment violated the Fourth Amendment. The question, the court stated, "is not where the police officer was standing when he made his observation, although police officers must establish that they had a legal right to be where they were[;] * * * rather it is the area that was observed." J.A. A19-A20. The court noted, without resolving the issue, that it was "plausible" that Thielen had legitimately positioned himself outside the apartment in a common area and had not invaded the apartment's curtilage. J.A. A20 & n.10. But it nevertheless concluded that, "even if * * * the area just outside the window was a common area," Thielen violated the Constitution because he had used "extraordinary measures to enable him to view the inside of the apartment." J.A. A22.

Explaining its finding of "extraordinary measures," the court noted that Thielen made his observations after he had left the sidewalk, walked across the grass, crossed over or by some bushes, placed his face within 12 to 18 inches of the window, and looked through a gap between the blinds. J.A. A22. Viewing the inside of a private dwelling through such "extraordinary measures," the court held, "constitute[s] a search under the Fourth Amendment." *Ibid.*

c. Three Justices dissented. J.A. A24-A28. They contended that prior decisions had held that a "transient visitor" has no legitimate expectation of privacy when he is simply "present on the property of another only to use the telephone or bathroom, was merely a party guest, or otherwise failed to establish a connection to the property beyond simply being present at the time of the search." J.A. A25-A26 (footnotes omitted). In this case, the dissent concluded, Carter had not shown an expectation of privacy that society would consider reasonable, because he established only that he was present in the apartment for two and one half hours for the purpose of conducting illegal activity. He did not show that he had ever been to the apartment before; that he had any prior relationship with the lessee; that he had any personal effects in the apartment; that he had a key to the apartment; or that he could invite other persons to, or exclude them from, the apartment. J.A. A27.

SUMMARY OF ARGUMENT

I. Temporary visitors to another person's apartment lack the legitimate expectation of privacy in the apartment that the Fourth Amendment requires to support a claim of an illegal search. The constitutional test is whether the visitor has an expectation

of privacy that society recognizes as reasonable. This Court has rejected the view that a sufficient expectation of privacy arises simply because a person is "legitimately on premises where a search occurs." *Rakas* v. *Illinois*, 439 U.S. 128, 141 (1978). Rather, the Court has required a more substantial or extended connection to another person's property. See, *e.g.*, *Stoner* v. *California*, 376 U.S. 483 (1964) (hotel guest); *Jones* v. *United States*, 362 U.S. 257 (1960) (guest with dominion and control over friend's apartment).

In *Minnesota* v. *Olson*, 495 U.S. 91 (1990), the Court found that such a legitimate expectation of privacy exists for an overnight guest in another person's private home. In evaluating the social expectations of houseguests, the Court observed that the need for a secure place to sleep is universal; that the host's home functions as a substitute domicile; that the overnight guest is likely to have a measure of control over the host's premises; and that hosts are likely to respect and act to protect the privacy interests of their overnight guests during their stay. The factors identified in *Olson* are absent in the case of a person making a brief social or business visit to another person's apartment.

Unlike an overnight guest, a temporary visitor generally has no expectation of control over his own privacy in another's dwelling. Nor do such visitors ordinarily use another person's apartment for the private and personal activities associated with the home. To recognize a privacy interest on behalf of such a transient visitor would come close to reviving the "legitimately on premises" test that this Court has already rejected. Accordingly, temporary visitors, such as respondents, cannot claim the legitimate

expectation of privacy that is needed to object to a search of their host's home.

II. Even if respondents could claim the protection of the Fourth Amendment, there was no search in this case. The Fourth Amendment permits officers to view with the unaided eye what is visible to any member of the public. That principle applies even if the officer trespasses on private property to look inside a dwelling (so long as he does not intrude on its curtilage). See, *e.g.*, *United States* v. *Dunn*, 480 U.S. 294 (1987); *Oliver* v. *United States*, 466 U.S. 170 (1984). It similarly applies if an officer views protected areas of a home from an overflight in an airplane or helicopter, since such a view is similar to what public air travelers could see. See, *e.g.*, *California* v. *Ciraolo*, 476 U.S. 207 (1986).

In this case, an officer was told by a private citizen that the citizen had observed suspicious activity in the apartment while passing by. The officer then went to the apartment, walked over a grassy common area to a point about one foot from the apartment's window, and looked through a gap in the blinds to observe respondents packaging drugs. The same view could have been seen by another tenant parking a bicycle; by a child chasing a ball; by a gardener trimming the bushes; or by a curious passerby. Nothing in the Fourth Amendment prohibited the officer from making the same observations that any member of the public could have made.

ARGUMENT

THE OFFICER'S OBSERVATION OF RESPONDENTS IN THE APARTMENT IN WHICH THEY WERE PACKAGING DRUGS DID NOT VIOLATE THEIR FOURTH AMENDMENT RIGHTS

"The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas* v. *Illinois*, 439 U.S. 128, 130 n.1 (1978). To meet that burden, respondents must make two showings. First, they must show that they had a legitimate expectation of privacy, protected by the Fourth Amendment, in the apartment in which they were evening visitors for the purpose of packaging drugs. Second, they must show that the officer's observations of the activities within the apartment constituted a Fourth Amendment search. Contrary to the decision of the Minnesota Supreme Court, respondents can make neither showing.

I. SHORT-TERM INVITEES DO NOT HAVE A LEGITIMATE EXPECTATION OF PRIVACY IN THE HOMES OF OTHERS

As this Court has explained, Fourth Amendment rights "are personal" and "may not be vicariously asserted." *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of *his* Fourth Amendment rights infringed." *Rakas*, 439 U.S. at 134 (emphasis added). Respondents were not observed while in their own apartment, or in any other location in which they had a property interest.

As a result, they must claim an expectation of privacy in the apartment of another person who had invited them in for a few hours to engage in the joint activity of packaging drugs. While this Court has held that an overnight guest has a protected expectation of privacy, see *Minnesota* v. *Olson*, 495 U.S. 91 (1990), respondents' brief and limited relationship to the apartment in which they were observed did not afford them a "legitimate expectation of privacy" in that place, *Rakas*, 439 U.S. at 143, and they therefore cannot show a violation of their own Fourth Amendment rights.

A. Reasonable Expectations Of Privacy In A Place Require More Than A Brief Or Limited Association With That Place

An individual's ability to "claim the protection of the Fourth Amendment depends * * * upon whether" he "has a legitimate expectation of privacy in the invaded place." *Rakas*, 439 U.S. at 143. An expectation of privacy in a particular place is "legitimate" only if it is one that "that society is prepared to recognize as 'reasonable.'" *Id.* at 143 n.12 (quoting *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Because application of the exclusionary rule to respond to a Fourth Amendment violation impedes "the search for truth at trial" by depriving the trier of fact of "relevant and reliable evidence," "misgivings as to the benefit of enlarging the class of persons who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations." *Rakas*, 438 U.S. at 137-138; see *Alderman*, 394 U.S. at 175 ("additional benefits of extending the exclusionary rule to other defendants" does not "justify fur-

ther encroachment upon" the strong interest of having "those accused of crime * * * acquitted or convicted on the basis of all the evidence which exposes the truth"); see also *United States* v. *Payner*, 447 U.S. 727, 734 (1980) (over-expansive use of the exclusionary rule can "impede unacceptably the truth-finding function of judge and jury").

A protected expectation of privacy must come from a source external to the Fourth Amendment, such as "concepts of real or personal property law" or shared "understandings that are recognized and permitted by society." *Rakas*, 439 U.S. at 143 n.12. Here, respondents do not claim a property interest in Ms. Thompson's apartment. As a result, their claim to Fourth Amendment protection must find support, if at all, in generally shared social understandings and expectations about privacy interests. *Ibid.*; *Katz*, 389 U.S. at 352-353.

This Court has rejected the view that society respects the privacy interests of "anyone legitimately on premises where a search occurs." *Rakas*, 439 U.S. at 141 (quoting *Jones* v. *United States*, 362 U.S. 257, 267 (1960)). As the Court explained, such a standard is "too broad a gauge for measurement of Fourth Amendment rights." 439 U.S. at 142.

> [A]pplied literally, [the "legitimately on premises" standard] would permit a casual visitor who has never seen, or been permitted to visit, the basement of another's house to object to the search of the basement if the visitor happened to be in the kitchen of the house at the time of the search. Likewise, a casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search ends would be able to contest the legality of the search. The first visitor would have absolutely no interest or legitimate expectation of privacy in the basement, the second would have none in the house, and it advances no purpose to permit either of them to object to the lawfulness of the search.

Ibid. Under *Rakas*, therefore, when an individual's association with a place is only brief and limited, he lacks a socially recognized interest in maintaining the privacy of that place. To support such a privacy interest, an individual must show a deeper or more lasting attachment, *i.e.*, he must show that he falls within a social tradition that respects that person's interest in solitude and in preventing unwanted intrusions.

In *Katz* v. *United States*, 389 U.S. at 352, this Court held that an individual has a legitimate expectation that his telephone conversations, made from an enclosed phone booth, will remain private: "One who occupies [an enclosed telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." The Court's holding reflected a social understanding and custom that members of society generally share—the assumption that personal conversations made from a phone booth are, like private letters dropped into the mail, see *United States* v. *Van Leeuwen*, 397 U.S. 249, 251 (1970), matters that individuals may ordinarily expect to remain private.

Similar considerations have led the Court to conclude that an individual has a legitimate expectation of privacy in his hotel room, much as he would in his own home. See, *e.g.*, *Stoner* v. *California*, 376 U.S.

483 (1964); *United States* v. *Jeffers*, 342 U.S. 48 (1951). A hotel guest's expectation of privacy is limited by the fact that he "gives 'implied or express permission'" for "'maids, janitors, * * * repairmen'" and the like "to enter his room 'in the performance of their duties.'" *Stoner*, 376 U.S. at 489 (quoting *Jeffers*, 342 U.S. at 51). Nonetheless, a hotel room functions in many respects as the guest's substitute "home," that is, as a refuge for the conduct of his most private and intimate affairs. Consequently, hotelier, guest, and society all share the common understanding that the guest's seclusion in his hotel room is entitled to great solicitude. For comparable reasons, the Court's cases repeatedly have recognized the legitimacy of privacy expectations in other temporary residences. *Ibid.*; see also *McDonald* v. *United States*, 335 U.S. 451 (1948) (tenant in a rooming house); *Chapman* v. *United States*, 365 U.S. 610 (1961) (renter of residential unit); *Johnson* v. *United States*, 333 U.S. 10 (1948) (hotel room).

Most recently, in *Minnesota* v. *Olson*, 495 U.S. 91 (1990), this Court applied a similar analysis to conclude that an overnight social guest has a legitimate expectation of privacy in his host's home. Before *Olson*, the Court had decided, in *Jones* v. *United States*, 362 U.S. 257 (1960), that a defendant who had a key to his friend's apartment, left and entered as he pleased, kept personal belongings in the apartment, had slept there, 362 U.S. at 259, and exercised "complete dominion and control over the apartment" including the authority to "exclude others from it," had a legitimate expectation of privacy there. *Rakas*, 439 U.S. at 149; see *Olson*, 495 U.S. at 98 ("[W]hile his host was away, [the petitioner in *Jones*] had complete dominion and control over the apartment and could

exclude others from it."). In *Olson*, this Court extended that holding to all overnight guests, finding that the "untrammeled power" or legal right "to admit and exclude" exercised by the defendant in *Jones* was not "essential to Fourth Amendment protection." 495 U.S. at 99.

To reach that conclusion, the Court considered whether the overnight guest's relationship to the host's dwelling creates an interest in privacy that society, by custom and tradition, treats with solicitude and respect. For the overnight guest, the Court explained, the host's home functions as a substitute domicile, a refuge "where he and his possessions will not be disturbed." 495 U.S. at 99. Overnight guests seek shelter in their host's home—just as they might seek shelter in a hotel room—precisely because they need a secure, private location:

> We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend.

Ibid.

Because of that universal need for security, the host, the guest, and society treat the overnight guest as having a privacy interest in the home, even though he has no legal right to exclude others and remains solely at his host's sufferance. "[W]hen the host is away or asleep, the guest," not unlike the homeowner's children, "will have a measure of control over the premises." *Olson*, 495 U.S. at 99. More important, even though the host has the legal right to

"admit or exclude from the house as he prefers," it is "unlikely that he will admit someone who wants to see or meet the guest over the objection of the guest." *Ibid.* And although "few houseguests will invite others to visit them" without consulting their hosts, the hosts by social custom "will often be accommodating." *Ibid.* As the Court summarized, "[t]he point is that hosts will more likely than not respect the privacy interests of their guests * * * despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." *Ibid.* *Olson* thus makes clear that social understandings can create a protected privacy interest in another person's home, but only when they reflect a reasonable expectation that the visitor's desire for seclusion and freedom from trespass will be acknowledged and respected by the host and by others.

B. Society Does Not Recognize The Privacy Expectations Of Invitees Other Than Overnight Guests As Legitimate

The reasoning of *Olson* does not extend to a person who is present in the home or apartment of another simply as a temporary guest. Rather, a brief visitor to an apartment is more similarly situated to a person who is simply legitimately on premises—a relationship that is not sufficient to support invocation of the Fourth Amendment. Unlike the overnight guest, who may treat the dwelling as a substitute home, *Olson*, 495 U.S. at 99; cf. *Stoner*, *supra*, and who may otherwise exercise authority to exclude others from the place as if he were its owner or co-tenant, *Jones*, *supra*, mere visitors generally lack a privileged sense of privacy in another person's home. In contrast to

overnight guests, transient visitors ordinarily are not given a substantial "measure of control over the premises." *Olson*, 495 U.S. at 99. Nor do such visitors ordinarily treat the home as their substitute residence, relying on it to afford privacy for personal activities uniquely associated with the home. Because a temporary visitor may retreat to his own home for such personal activities, society does not generally share the understanding that, to protect the guest's privacy, the host will exclude others on the guest's behalf.

To the contrary, one who merely visits the home of another and does not stay there overnight ordinarily arrives without any expectations regarding the admission or exclusion of others. Instead, it is commonly accepted that hosts are free to admit or exclude others as they see fit. For example, one invited to a dinner party at another's home would hardly be surprised to find additional guests seated at the table, even though this would render the occasion substantially less private. Nor would one invited to the home for business be surprised to find others there as well. Consequently, the lower federal courts have concluded that social invitees and party guests have no reasonable expectation of privacy in another's home.[3] And the courts similarly have held that one who

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[3] *United States* v. *Maddox*, 944 F.2d 1223, 1234 (6th Cir. 1991) (purely transient party guest had no reasonable expectation of privacy in his host's home); *United States* v. *McNeal*, 955 F.2d 1067, 1072-1073 (6th Cir. 1992) ("casual transient visitor" who stopped by to use the phone lacks legitimate expectation of privacy in home of another); *United States* v. *Grandstaff*, 813 F.2d 1353, 1357 (9th Cir. 1987) (one who is merely present, and does not stay overnight, in the hotel room of another lacks a legitimate expectation of privacy).

merely arrives to conduct an unlawful business transaction,[4] or uses another's home not as a refuge from society but as an open front for his illegal business operations, lacks a legitimate expectation of privacy there as well.[5]

This Court has likewise recognized limits on the expectations of privacy that society considers legitimate. The Court has held that passengers in another person's car cannot claim the protection of the Fourth Amendment to object to a search of the glove box or the area under the car's seat. *Rakas*, 477 U.S. at 148. It has held that a person who places "thousands of dollars worth of illegal drugs" in the purse of an acquaintance cannot claim a reasonable expectation of privacy in the purse, since the person lacks a "right to exclude other persons from access" to it. *Rawlings* v. *Kentucky*, 448 U.S. 98, 105 (1980). And it has held that merely participating in a joint venture to transport drugs does not give a co-conspirator the right to object to a search or seizure of another conspirator's vehicle used for that purpose, absent a recognized basis for asserting a privacy expectation

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[4] *Terry* v. *Martin*, 120 F.3d 661, 663-664 (7th Cir. 1997) (where evidence showed only that defendant was visiting the premises for the purpose of an unlawful transaction—the purchase of heroin—defendant lacked reasonable expectation of privacy); *United States* v. *Wiley*, 847 F.2d 480, 481 (8th Cir. 1988) (cocaine dealer lacked reasonable expectation of privacy when making business visit to the home of a customer).

[5] *United States* v. *Hicks*, 978 F.2d 722, 724 (D.C. Cir. 1992) (invited guest who used his host's apartment "as a base for his business operations"—the sale of crack cocaine—rather than as a "sanctuary from outsiders" lacked a reasonable expectation of privacy and was indistinguishable "from any other invited guest" who might have been there when the police showed up).

or property interest in the vehicle. *United States* v. *Padilla*, 508 U.S. 77 (1993) (per curiam). By the same token, temporary guests, even when engaged in a joint venture with the host, lack a legally or socially recognized right to exclude others—or to have the host exclude others on their behalf—in order to maintain their privacy in the host's dwelling. They therefore cannot rely on the Fourth Amendment to object to intrusions on the privacy of that place.

C. Respondents Were Mere Invitees With No Reasonable Expectation of Privacy In The Premises

In this case, respondents did not have a sufficient connection to the apartment to assert a legitimate expectation of privacy in it. Unlike the defendant in *Jones*, they did not exercise dominion and control over it. Unlike the defendant in *Olson*, they did not sleep overnight there or use the apartment as a substitute home, *i.e.*, a refuge for the conduct of intimate affairs uniquely associated with the home. As a result, there was no legal or general social understanding that they—mere "short-term business callers," J.A. C8—would have the right to exclude others, or that others would be excluded on their behalf, to preserve their privacy. To the contrary, consistent with general social understandings and societal expectations, the apartment's lessee, Ms. Thompson, could have admitted other guests during their brief presence and was in no way obliged to defer to their wishes regarding the exclusion of others.

The factors relied upon by the Minnesota Supreme Court—that respondents "had the leaseholder's permission to be inside the apartment," "remained inside the apartment for at least 2 1/2 hours," and spent their time inside the apartment "work[ing] in concert

with the leaseholder on [the] common task" of bagging cocaine, J.A. A17-A18, do not meaningfully distinguish this case from *Rakas*. In *Rakas*, as here, the defendants had the owner's permission to be on the premises; they had been there for "some time" (although the opinion does not reflect how long); and they were engaged in a common task with the car's owner—making a get-away from a clothing store robbery. 439 U.S. at 130. Consequently, just as the passengers lacked a legitimate expectation of privacy in *Rakas*, so too respondents lacked a legitimate expectation of privacy here.

To reach the opposite conclusion, the Minnesota Supreme Court did not look at shared social understandings but instead attempted to determine the degree to which society "value[d]" respondents' connection to the apartment. "[I]f [respondents'] ha[ve] established that [their] status is the type that serves functions recognized as valuable by society," the court explained, then "[their] expectation of privacy is legitimate." J.A. A16; see J.A. 18 ("If the relationship" between "the property possessor and the person alleging the privacy interest in the property" is "the type that society recognizes as valuable, then we will find standing."). Even highly valuable relationships between invitees and property owners, however, do not necessarily give rise to legitimate expectations of privacy. Repairmen may enter dwellings to preserve a home's physical integrity; piano teachers and tutors may educate the homeowner's children; appraisers may help protect the financial investment of the owner; and doctors may make housecalls to protect the occupant's health or life. None of those visitors, however, has an expectation of privacy in the home he is visiting.

In any event, the court assessed the "value" of the relationship in this case at so high a level of generality that its conclusions were incongruous. The specific use to which respondents put Ms. Thompson's apartment was as a site for "the task of bagging cocaine"—an activity that admittedly is one that "society does not recognize as valuable." J.A. A18; cf. *Padilla*, *supra* (co-conspirator in a drug transaction does not, simply by virtue of that relationship, acquire a protected Fourth Amendment interest in property used by the drug venture). But the court concluded that the relationship was valuable nonetheless by describing the relationship as an exercise of "the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task." J.A. A18. An analysis on that high a level of generality loses sight of the touchstone of a protected privacy interest: a socially sanctioned expectation of an individual that he will not be disturbed. Because respondents lacked such a reasonable expectation, they cannot rely on the protections of the Fourth Amendment here.

II. UNAIDED OBSERVATION OF A DWELLING FROM A COMMON AREA OPEN TO THE PUBLIC IS NOT A "SEARCH" WITHIN THE MEANING OF THE FOURTH AMENDMENT

Even if respondents had a protected privacy interest in the dwelling in which they were packaging drugs, the officer's observations of the dwelling did not constitute a "search" within the meaning of the Fourth Amendment. When an officer makes observations from a legitimate location—such as when the officer stands in an open field or common area—then

unaided observation from that vantage point cannot constitute a "search."

A. Unaided Observation From A Public Or Common Area Is Not A Search

1. Although constitutional protection against unreasonable intrusion is at its strongest in a person's home, *Oliver* v. *United States*, 466 U.S. 170, 178 (1984); *Payton* v. *New York*, 445 U.S. 573, 601 (1980), "[w]hat a person knowingly exposes to the public, even in his own home * * * is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. Police officers ordinarily "may see what may be seen from a public vantage point" without triggering constitutional concerns. *Florida* v. *Riley*, 488 U.S. 445, 449 (1989) (plurality opinion) (internal quotation marks omitted); see *id.* at 454 (O'Connor, J., concurring). "[T]he home and its curtilage" thus "are not necessarily protected from inspection that involves no physical invasion." *Id.* at 449 (plurality opinion).

In *California* v. *Ciraolo*, 476 U.S. 207 (1986), this Court held that it was permissible for officers to use an airplane to fly over and view the backyard of a house where a high fence prevented ground level observation. The Court agreed that the yard in that case was entitled to the same constitutional protection as the home itself because it was within the "curtilage." See 476 U.S. at 213. But the Court nonetheless held that the overhead surveillance was not a search. The observations were made from public airspace, "in a physically nonintrusive manner," and any member of the public "who glanced down could have seen everything that these officers observed." *Id.* at 213-214.

> [Officers need not] shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.

Id. at 213.

For almost identical reasons, the Court also has upheld warrantless, low-altitude helicopter observation of a greenhouse behind a defendant's mobile home. See *Riley*, 488 U.S. at 449-450 (plurality opinion) (although occupant "no doubt intended and expected that his greenhouse would not be open to public inspection," any "member of the public could legally have been flying over" the greenhouse and looked into it); see *id.* at 455 (O'Connor, J., concurring). As Justice O'Connor observed in her concurrence, now that public air travel is routine, it is unreasonable for homeowners to expect that their property will not be viewed from above. *Id.* at 453.

Just as police officers may make unaided observations from public airspace consistent with the Fourth Amendment, so too may they make similar observations from public areas at ground level. Indeed, they constitutionally may do so while trespassing on private property, so long as they make their observations from "open fields" and do not physically invade the curtilage of the home, *i.e.*, the area immediately surrounding the home "to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver*, 466 U.S. at 176, 180 & n.12; *United States* v. *Dunn*, 480 U.S. 294 (1987); *Hester* v. *United States*, 265 U.S. 57, 59 (1924) (Fourth

Amendment protection "is not extended to the open fields" whose distinction from "the house is as old as the common law.").

In *Dunn*, the officers entered the defendant's property, crossed several fences, and shined a flashlight into the window of the defendant's barn. 480 U.S. at 297-298, 304. Rejecting a Fourth Amendment challenge to the officers' conduct, this Court held that—even if one assumed that the defendant's barn, like his home, was constitutionally protected and "could not be entered * * * without a warrant," *id.* at 303—the officers' observations were not barred by the Fourth Amendment because they were made while "standing * * * in the open fields" and without crossing into the curtilage. *Id.* at 304. There is "no constitutional difference," the Court held, "between police observations [made from] a public place and [those made] while standing in open fields." *Ibid.*[6]

As a result, the Minnesota Supreme Court's assertion that the determinative issue is "not where the police officer was standing when he made his observation[;] * * * rather it is the area that was observed," J.A. A19-A20, is incorrect. *Ciraolo*, *Riley*, and *Dunn*

[6] Just as the alleged trespass was irrelevant in *Dunn*, 480 U.S. at 297-298, 304, so too is respondents' reliance on Minnesota's window-peeping statute. Resp. Br. in Opp. at 12 (citing Minn. Stat. 609.746 (1996)). The "concepts of privacy under the laws of each State" do not determine the extent of Fourth Amendment protection. *California* v. *Greenwood*, 486 U.S. 35, 44 (1988). In fact, the "interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile." *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 394 (1971).

establish that, even where "the objects observed by the officers lay within an area that * * * was protected by the Fourth Amendment," the "Constitution d[oes] not forbid [the officers] to observe" those areas with their naked eyes so long as they make their observations from an area outside the curtilage where members of the public might reasonably do the same. *Dunn*, 480 U.S. at 304; see *Ciraolo*, 476 U.S. at 213-214 (naked eye observation of protected curtilage from non-intrusive aerial viewpoint constitutionally permissible); *Riley*, 488 U.S. at 451-52 (plurality opinion); *Riley*, 488 U.S. at 454 (O'Connor, J., concurring) (critical question is "whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that [the] expectation of privacy from aerial observation was not one that society is prepared to recognize as reasonable" (internal quotation marks omitted)).

2. In this case, Thielen observed the apartment from a grassy, common area that was not only open to "public * * * access" but also regularly approached by other tenants who would "leave the common sidewalk * * * to deposit [and store] their bicycles" nearby. J.A. E10; see J.A. E12 ("residents did walk upon and use the grassy area in front of Ms. Thompson's window"); J.A. E10 ("the public had access to the area directly in front of Ms. Thompson's windows to store bicycles"). There were no fences, trees, or bushes that might block public entry into the area where Thielen stood, or otherwise prevent public viewing through the window. J.A. E10; see J.A. I1-I7. Thus, the observations that Thielen made just as easily could have been made intentionally or inadvertently by any member of the public, such as another tenant parking a bicycle, a child chasing a

ball, a gardener pruning the bushes, or a curious passerby. Indeed, Thielen went to the apartment in the first place precisely because a member of the public had walked by the apartment, observed suspicious activity inside, and reported it to the police. J.A. A8, E2. There is nothing in the Fourth Amendment that bars law enforcement officers from making the same observations that any member of the public or other tenant of the building just as easily could have made. See *Ciraolo*, 476 U.S. at 215; *Riley*, 488 U.S. at 454 (O'Connor, J., concurring); cf. *California* v. *Greenwood*, 486 U.S. 35, 40 (1988) ("respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection" because the "garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public" (footnotes omitted)).

B. "Extraordinary Measures" To Reach A Public Place Do Not Convert Unaided Observation Into A Search

The Minnesota Supreme Court assumed that Thielen did not enter any area in which respondents had a protected Fourth Amendment interest—apartment or curtilage.[7] The court nonetheless held that

[7] The lower Minnesota courts found that the area where Officer Thielen stood was not curtilage, J.A. E12, D4, and the Minnesota Supreme Court declined to reach the issue, although it noted that the lower courts' conclusion was "plausible," J.A. A20 & n.10. This Court should not revisit that fact-intensive determination, which did not form the basis for the ruling below, J.A. A22. In any event, the lower Minnesota courts properly examined the four factors used to determine whether the area was curtilage, see *Dunn*, 480 U.S. at 301, and correctly concluded that it was not. Although the area was close to the apartment unit, it was not specifically identified with or associated with that unit; it was not enclosed; no one took any steps to obscure observation; and, perhaps most important of all, it was common to all tenants in the building (who stored their bicycles nearby) and open to the public at large. J.A. E10-E11; see pp. 25-26, *supra*. Federal courts have often found that common areas surrounding garden apartments do not harbor the "intimate activity" associated with the home, *Dunn*, 480 U.S. at 300, and thus are not curtilage. See *United States* v. *Cruz-Pagan*, 537 F.2d 554, 558 (1st Cir. 1976) (no expectation of privacy in condominium parking garage); *United States* v. *Fields*, 113 F.3d 313, 317, 321-322 (2d Cir.) (no Fourth Amendment violation where officers stood in fenced side yard of three-family apartment house and peered into apartment window through partly raised shade), cert. denied, 118 S. Ct. 434 (1997); *United States* v. *Acosta*, 965 F.2d 1248, 1252, 1255-1257 (3d Cir. 1992) (fenced backyard of apartment building not curtilage of apartment; resident had no reasonable expectation of privacy there or in apartment building hallway); *United States* v. *Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991) (no expectation of privacy in common areas of building); *United States* v. *Eisler*, 567 F.2d 814, 816 (8th Cir. 1978) (no expectation of privacy in hallway); *United States* v. *Nohara*, 3 F.3d 1239, 1242 (9th Cir. 1993) (no reasonable expectation of privacy in common area of high-security high-rise).

Thielen's unaided observations from a publicly accessible place constituted a search because he "took extraordinary measures to enable him to view the inside of the apartment." J.A. A22; see *ibid.* ("search" occurred because "the totality of [the officer's] acts" indicated that he took "extraordinary measures").

The court's "extraordinary measures" standard is flawed. To determine whether a search has taken place, courts must ask if the conduct "infringed" on "an expectation of privacy that society is prepared to consider reasonable." *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984). When the officer's ultimate vantage point is one that a neighbor or another member

of the public might well have assumed, any expectation of privacy against being seen from that location is by definition unreasonable—even if it was difficult for a particular officer to acquire that vantage point. See, *e.g.*, *Ciraolo*, 476 U.S. at 213-214 (upholding police use of aerial observation not because it was less than an extraordinary effort but rather because the traveling public might have obtained the same view in airline flight); *Riley*, 488 U.S. at 454 (O'Connor, J., concurring) (same). An officer might have to climb many flights of an outdoor fire escape on a public building to reach a rooftop garden that overlooks the backyard of a dwelling, but the degree of exertion would not convert his observations into a Fourth Amendment search.

Nor does it make a difference that Thielen intentionally positioned himself so that he could see inside. This Court repeatedly has rejected the claim that the officer's intent has anything to do with the legitimacy of an individual's expectation of privacy. See *Dunn*, 480 U.S. at 304-305 (because the observation was made from an unprotected area, it is constitutionally "irrelevant that the police observation at issue was directed specifically at the identification" of contraband inside a protected place); *Ciraolo*, 476 U.S. at 212 (rejecting respondent's challenge to "the authority of government to observe his activity from any vantage point or place if the viewing is motivated by a law enforcement purpose, and not the result of casual, accidental observation"). See also *Horton* v. *California*, 496 U.S. 128, 138, 140 (1990) (rejecting inadvertence requirement under "plain view" doctrine because "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective

state of mind of the officer" and because "no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent").

In any event, Thielen's "measures" can hardly be labeled extraordinary in comparison to the means upheld by this Court in the past—and characterizing such measures as "extraordinary" would create an unworkable standard for use by officers in the field. Thielen did not obtain an aircraft, hire a pilot, and fly over the dwelling to be able to see in. Contrast *Riley*, *supra*; *Ciraolo*, *supra*. Nor did he traverse acres of private property, cross fence after fence, and stand under the eaves while shining a flashlight into the structure. Contrast *Dunn*, 480 U.S. at 297-298, 304. Instead, Thielen at most crossed the grass in a common area of the apartment, stepped over or around low bushes, and—standing in an area that was open to "public * * * access" and often approached by other tenants for the purpose of storing their bicycles, J.A. E10—observed the inside of an apartment through gaps in the window blinds. J.A. A22. Even assuming that Officer Thielen crouched down to be able to see, J.A. A21, his actions were not extraordinary. The same observation still could have been made by a gardener clipping the bushes, by adults sitting in the grass, or by a shorter officer with no need to crouch. See *Texas* v. *Brown*, 460 U.S. 730, 740 (1983) (plurality opinion) (whether officer "'changed position,' and 'bent down at an angle so [he] could see what was inside'" the car, is "irrelevant to Fourth Amendment analysis;" because the "general public could peer into the interior * * * from any number of angles," there is no legitimate expectation of privacy in that which can be viewed from outside by "inquisitive passersby or diligent police officers."). Because Thielen stood

where any member of the public might have been, his observations transgressed no legitimate expectation of privacy and did not constitute a search.

CONCLUSION

The judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MINNESOTA,
Petitioner,

v.

WAYNE THOMAS CARTER AND MELVIN JOHNS,

Respondents.

On Writ of Certiorari
To The Supreme Court of Minnesota

BRIEF OF 26 STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does a visitor to an apartment have an expectation of privacy which society is prepared to recognize as reasonable based exclusively upon his act of engaging in a common task with the leaseholder of the apartment?

2. Is a police officer's non-enhanced use of his natural senses from a public area in order to investigate a report of criminal activity not a search under the Fourth Amendment to the United States Constitution?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1147

STATE OF MINNESOTA,

Petitioner,

v.

WAYNE THOMAS CARTER AND MELVIN JOHNS,

Respondents.

On Writ of Certiorari
To The Supreme Court of Minnesota

BRIEF OF 26 STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37, the signatory States respectfully submit this brief as amici curiae in support of Petitioner.

INTEREST OF THE AMICI CURIAE

At stake in this case is the ability of law enforcement officers to investigate, arrest, and successfully prosecute those involved in the occupation of illicitly distributing controlled substances. That ability has been severely hampered in the State of Minnesota by the holding in the instant case, and it would not bode well if accepted by other courts.

There is no need to spell out the tragedies and atrocities which have resulted and continue to result nearly unabated as a consequence of the illegal drug trade. It is a well-recognized issue of national concern. Permitting the Respondents, on the basis of little more than presence in an apartment in order to package drugs, to successfully claim a reasonable expectation of privacy in that apartment, categorizing the unaided observations by a police officer from a public area as a search, and finding the officer's actions unreasonable fly in the face of society's expectations. If accepted as a correct reading of Fourth Amendment law, the holding of the Minnesota Supreme Court provides unwarranted sanctuary to a criminal element and places irrational limits on what a police officer may do in responding to a report of criminal activity.

The interests of the amici States accord with those of the Petitioner, the State of Minnesota, in seeking to overturn the reversal of the Respondents' convictions. The decision of the Minnesota Supreme Court conflicts with relevant decisions of both the United States Supreme Court and other state and federal courts regarding the issue of legitimate privacy expectations of an invitee and the definition of a search under the Fourth Amendment to the

United States Constitution.

SUMMARY OF ARGUMENT

The Fourth Amendment protects the right to be free from unreasonable searches and seizures by government agents. However, that right turns, not entirely or exclusively on the right to privacy, but on a reasonable expectation of privacy in a given activity.

The Fourth Amendment is not place-specific, but people-specific. Nonetheless, notions of property interests remain viable considerations. The home, be it a single-family, detached dwelling, an apartment or condominium, or a temporary hotel or motel room, always merits special protections from unwarranted intrusions to the extent those areas are co-extensive with intimate and private activities. Beyond those areas, and to anything one knowingly exposes to the public, a different standard applies.

As an initial matter, one claiming violation of a Fourth Amendment right while in the dwelling place of another must establish a legitimate expectation of privacy in that place. While this Court has recognized that an overnight guest may rely on the protections of the Fourth Amendment, it has not fully defined what constitutional protections are available to an individual who is legitimately in a dwelling place for a purpose other than an overnight stay. Mere legitimate presence on premises is not enough. And therein lies one of the errors in the holding of the Minnesota Supreme Court.

The Respondents were in the apartment at the invitation of the leaseholder to cut and package cocaine. There was no evidence that the Respondents stayed overnight, had a

key to the apartment and freely came and went, kept personal belongings there, or exerted any control over ingress and egress. The exclusive basis for finding a legitimate expectation of privacy in this case was the sharing of a common task with the leaseholder.

The focus of the Minnesota Supreme Court was misplaced. That focus should have been directed at the relationship of the Respondents to the place in question, not their relationship to the leaseholder. In this case, there was a totally insufficient nexus between the Respondents and the apartment. The Respondents, therefore, had no right to claim violation of any Fourth Amendment privacy interest.

Even assuming for the sake of argument that the protections of the Fourth Amendment were available to Respondents in the apartment, there was nothing in the actions of the police officer to implicate the Fourth Amendment. In considering whether a particular law enforcement activity implicates constitutional protections, one looks at the nature of the space targeted, the location of the government agent, and whether the subject of the activity has exhibited a subjective expectation of privacy that society is prepared to recognize as reasonable. If the targeted space is a public or common area, the government agent is in a place commonly traveled, and the subject has either demonstrated no expectation of privacy, or society is not prepared to accept that expectation as reasonable, there has been no search. Therefore, the subject cannot seek solace in the protections of the Fourth Amendment, as Respondents successfully did in this case.

The common area of a multi-unit apartment complex is not curtilage and is sufficiently utilized by others that the police officer here was in a place he had a right to be. A

noticeable gap in the window blinds demonstrated that the occupants of the apartment did not demonstrate an expectation of privacy from view by those passing through the adjacent common area. Even if the occupants hoped for some level of privacy, under the facts of this case, society is not prepared to accept that hope as a legitimate and reasonable expectation. The officer's brief observations of illicit drug packaging through the gap in the window blinds was not a search.

For all of these reasons, the Minnesota Supreme Court erred in finding that the Respondents had a legitimate expectation of privacy in the apartment and that the actions of the police officer constituted an unreasonable Fourth Amendment search.

ARGUMENT

I.

A VISITOR TO AN APARTMENT, SIMPLY BY VIRTUE OF ENGAGING IN A COMMON TASK WITH THE LEASEHOLDER OF THE APARTMENT, DOES NOT HAVE A FOURTH AMENDMENT EXPECTATION OF PRIVACY WHICH SOCIETY IS PREPARED TO RECOGNIZE AS REASONABLE.

A. Fourth Amendment rights are personal to the individual claiming an infringement of those rights.

No greater right to privacy exists than the right of privacy an individual enjoys in his or her own home. This

right is based upon the Fourth Amendment to the United States Constitution, which provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . " U.S. Const. Amdt. 4. But the "rights assured by the Fourth Amendment are personal rights, [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Rakas v. Illinois*, 439 U.S. 128, 138 (1978) (quoting *Simmons v. United States*, 390 U.S. 377, 389 (1968)). In determining whether the exclusionary rule is applicable, a court is to focus "on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Rakas v. Illinois*, 439 U.S. at 139. As the Court explained:

> Analyzed in these terms, the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.

Id. at 140.

When an individual is in the dwelling place of another, the appropriate inquiry in determining whether the individual claiming the right is entitled to the protection of the Fourth Amendment is whether the individual has exhibited a subjective expectation of privacy and whether that expectation of privacy is one that society is prepared to recognize as reasonable. *Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990) (citing *United States v. Katz*, 389 U.S.

347, 361 (1967) (Harlan, J., concurring)). As explained by the Court in *Vernonia School District 473 v. Acton*, 515 U.S. 646 (1995), the expectations of privacy that society is willing to accept as legitimate vary "depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park." *Id.* at 654.

In *Oliver v. United States*, 466 U.S. 170 (1984), the Court recognized that "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id.* at 182-83 (footnote omitted). In determining what privacy expectations society is prepared to recognize as reasonable, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment . . . the uses to which the individual has put a location . . . and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Id.* at 178. Justice Powell, in his concurring opinion in *Rakas*, offered that consideration should be given to whether the individual invoking the protection of the Fourth Amendment took normal precautions to maintain his privacy; how he used the location; and whether certain types of government intrusion were perceived historically to be objectionable. 439 U.S. at 152-53.

What expectation of privacy society is willing to recognize as reasonable has been decided on a case-by-case basis. In *Katz*, by entering a telephone booth and closing the door, Katz closed out the world from his conversation. Dr. Ortega, in *O'Connor v. Ortega*, 480

U.S. 709 (1987), had a privacy interest in his desk and filing cabinets in his hospital office because his desk and his filing cabinets were under his control. By comparison, in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), because Rawlings had no control over his companion's purse, he had no privacy interest that society was willing to recognize as reasonable. Recognition of any privacy interest as valid turns upon the controls the individual claiming the right exerts and the uses to which he puts the area. Stated otherwise, it is the relationship of the individual who asserted the privacy right to the place in question.

In *Olson*, the Court established that society is willing to recognize as reasonable the right of an overnight guest to be free from a warrantless entry of law enforcement officers to effect his arrest, finding that it was "merely recogniz[ing] the everyday expectations that we all share." 495 U.S. at 98. *Olson*, however, did not reach the question raised herein of what expectation of privacy society is willing to recognize in an individual who is legitimately in a dwelling place for a purpose other than an overnight stay.

B. The Respondents had no legitimate privacy interest in the leaseholder's apartment based only on the sharing of a common task.

In the instant case, the Minnesota Supreme Court found as controlling "the nature of the relationship between the property possessor and the person alleging the privacy interest in the property." *State v. Carter*, 569 N.W.2d 169, 176 (Minn. 1997). Thus the court concluded that "society does recognize as valuable the right of property owners or

leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity. We, therefore, hold that Carter had standing. . . ." *Id.*

The error committed by the Minnesota court was its focus on the property owner's or leaseholder's right to engage in activities and thereby "bestow" to others an expectation of privacy. The proper focus must be on the relationship the individual claiming the right has with the property itself, not on any right of the property owner or leaseholder.

The reasoning of the Minnesota court echoes the "legitimately on premises" standard of *Jones v. United States*, 362 U.S. 257 (1960). The Court in *Jones* held "that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." *Id.* at 267. Eighteen years later in *Rakas*, the Court rejected this standard, limiting its application to the specific facts in *Jones*. 439 U.S. at 143. According to the Court, the *Katz* legitimate expectation of privacy in the invaded place standard was the appropriate analysis in considering a Fourth Amendment claim. *Id.* The Court found that the phrase, "legitimately on premises" coined in *Jones* "creates too broad a gauge for measurement of Fourth Amendment rights." *Id.* at 141-42.

The record in this case reflects only that Carter, Johns, and Thompson were present in Thompson's apartment for two and one-half hours, during which time their only known activity was cutting and packaging cocaine. The record is devoid of any evidence that either Carter or Johns had any authority to establish their own personal privacy--to control whose eyes or ears detected their

activities in the apartment. Everything Carter and Johns did was observable to anyone who entered Thompson's apartment. While they may have trusted that Thompson would not allow their activities in the apartment to be observed or detected by others, such trust was merely a hope, not an expectation that society recognizes as reasonable. Unlike the expectation of privacy which an overnight guest justifiably holds by virtue of his host's home becoming his temporary dwelling place, society is not willing to recognize that a leaseholder can confer an expectation of privacy simply by virtue of inviting an individual to partake in a "common task" in her domicile.

Since *Olson*, lower courts have addressed the issue of what expectation of privacy society is willing to recognize as reasonable for an individual who is present in the dwelling place of another, with the line drawn somewhere between "legitimately on premises" at one end of the spectrum and "overnight guest" at the other. *See, e.g., United States v. Dickson*, 64 F.3d 409, 410 (8th Cir. 1995) (legitimate overnight guest has reasonable expectation of privacy recognized by Fourth Amendment); *Heard v. State*, 876 S.W. 2d 231, 233 (Ark. 1994) (same); *Hanna v. State*, 591 A.2d 158, 163-64 (Del. 1991) (same); *Brown v. State*, 691 N.E.2d 438, 443 (Ind. 1998) (same). But mere presence in the early morning hours does not establish that one is an overnight guest. *Hill v. United States*, 664 A.2d 347, 352-53 (D.C. 1995) (arrival at apartment at 3:00 a.m. a few minutes before police arrive and feigning sleep while fully dressed and wearing shoes neither established status as overnight guest nor a legitimate expectation of privacy). One who has previously been an overnight guest has no expectation of privacy. *Davasher v. State*, 823 S.W. 2d 863, 868 (Ark. 1992) ("the mere fact that

Davasher frequently stayed at his mother's home does not give him a reasonable expectation of privacy in the premises").

Courts faced with the question of what expectation of privacy society is willing to recognize as reasonable for an individual who is in a dwelling place for purposes of other than being an overnight guest have found no such expectation. *See, e.g., United States v. Hicks*, 978 F.2d 722, 723-24 (D.C. Cir. 1993) (guest using apartment as base for business operations of illegal drug transactions, although legitimately on the premises, did not have a legitimate expectation of privacy); *United States v. Maddox*, 944 F.2d 1223, 1234 (6th Cir. 1991) (party guest has no reasonable expectation of privacy in items found in home); *Fisher v. State*, 665 So.2d 1014 (Ala. Cr. App. 1995) (a party guest who did not establish that he was an overnight guest had no standing to challenge warrantless search of apartment in which he was arrested); *People v. Cowan*, 37 Cal. Rptr. 2d 469, 471 (Cal. App. 1994) (one "who has visited in the past and who was allowed to use the apartment when he visited" does not have a legitimate expectation of privacy); *Lewis v. United States*, 594 A.2d 542, 545-46 (D.C. 1991) (a "mere guest" at a party has no reasonable expectation of privacy in the host's home); *People v. Bass*, 580 N.E.2d 1274, 1283 (Ill. App. 1991) ("mere presence in the home of a friend at the time . . . is insufficient to confer standing"); *State v. Vasquez*, 922 P.2d 426, 428 (Idaho App. 1996) (same); *Owens v. State*, 589 A.2d 59, 63-64 (Md. 1991) (no expectation of privacy where defendant had not spent the night, did not have a key, could only enter with tenant's permission, and had no control over who entered the apartment); *People v. Ortiz*, 593 N.Y.S. 2d 806, 807 (1993) (defendant had no standing

to challenge search of girlfriend's apartment where he was not overnight guest, had not been in apartment for some time, kept no possessions there, had no key, and did not contribute to rent); *People v. Melendez*, 553 N.Y.S. 2d 808, 809 (1990) (defendant's presence in apartment in order to operate drug "factory", without more, insufficient to establish standing). *But see State v. Ackerman*, 499 N.W.2d 882, 884-85 (N.D. 1993) (party guest had standing to contest the legality of police entry at approximately midnight); *United States v. Fields*, 113 F.3d 313, 320-21 (2d Cir. 1997) (individual who paid for use of apartment to cook crack cocaine and had a key so that he could come and go as he pleased had a reasonable expectation of privacy).

Contrary to a majority of other courts, the Minnesota Supreme Court determined that the possessor of property may confer the protections of the Fourth Amendment upon a guest merely by engaging in a "common task." This determination is inconsistent with the standard applied by this Court, which, rather than looking at the interaction of the property possessor and his guest, looks at the relationship of the defendant to the place searched. The Minnesota court's change in focus represents a significant departure from the Court's precedent and should be rejected.

II.

A POLICE OFFICER'S NON-ENHANCED USE OF HIS NATURAL SENSES FROM A PUBLIC AREA IN ORDER TO INVESTIGATE A REPORT OF CRIMINAL ACTIVITY IS NOT A SEARCH UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Non-enhanced observations by police officers while lawfully situated are not searches.

The appropriate inquiry in determining what constitutes a search, and is, thereby, deserving of Fourth Amendment protection is, again, whether an individual has exhibited a subjective expectation of privacy in a given activity and whether that expectation is one that society is prepared to recognize as reasonable. *United States v. Katz*, 389 U.S. at 361. The Court has applied the *Katz* standard to a wide variety of law enforcement activities and techniques. In considering whether government conduct, be it visual, technical, or electronic surveillance, constitutes a search implicating the Fourth Amendment, the Court's attention has been directed to a number of factors, including, but not limited to, the space observed, the place from which a given activity was observed, and the manner of observation. *See, e.g., Smith v. Maryland*, 442 U.S. 735 (1979) (pen register on home telephone); *United States v. Knotts*, 460 U.S. 276 (1983) (beeper transported in automobile); *United States v. Karo*, 468 U.S. 705 (1984) (beeper carried into home); *United States v. Place*, 462

U.S. 696 (1983) (dog sniff of luggage at airport); *California v. Ciraolo*, 476 U.S. 207 (1986) (helicopter overflight of backyard); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (helicopter overflight of commercial activity with aerial mapping camera); *United States v. Dunn*, 480 U.S. 294 (1987) (ground level observation into barn); *Florida v. Riley*, 488 U.S. 445 (1989) (helicopter overflight of greenhouse on private property).

In considering whether there was a search in the case now before the Court, two factors dictate whether Respondents can legitimately claim, for constitutional purposes, an expectation of privacy in their drug packaging activities. The first is whether Officer Thielen was in a place he was allowed to be when he made his observations, and the second focuses on the means he employed in observing the activities of the Respondents. As will be seen, application of the principles espoused by the Court demonstrates that the actions of Officer Thielen did not offend any reasonable expectation of privacy and, therefore, did not constitute a search calling into play the Fourth Amendment rubric.

In both *Ciraolo* and *Dow Chemical*, the Court held that neither the warrantless aerial observation of a defendant's backyard nor aerial observation and photography of a defendant's manufacturing complex implicated the Fourth Amendment. In the former, the police, based on an anonymous tip, flew a helicopter over Ciraolo's backyard, which was shielded from street-level observation by two fences, and observed marijuana plants growing in his yard. 476 U.S. at 209. A lower California court, in reversing Ciraolo's conviction, found that the height and existence of two fences indicated a reasonable expectation of

privacy, and the fact that the overflight was "focused observation" made it a search. *Id.* at 210. On the other hand, the State "analogize[d] its mode of observation to a knothole or opening in a fence: if there is an opening, the police may look." *Id.*

Granting that the fence indicated at least a subjective expectation of privacy on Ciraolo's part, the Court determined that society was not prepared to accept this expectation as reasonable based on the fact that the observations took place in public airspace in a nonintrusive manner. *Id.* at 211-14. According to the Court, "[t]he Fourth Amendment simply does not require the police traveling in public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye." *Id.* at 215. While Ciraolo may have "manifested merely a hope that no one would observe his unlawful gardening pursuits," such hopes do not equate to reasonable expectations of privacy. *Id.* at 212.

Likewise, in *Dow Chemical*, the aerial photography of a 2,000 acre industrial complex was not a search. The Court concluded that the aerial mapping camera used by the Environmental Protection Agency (EPA) may have been more precise than conventional cameras, but it was not "some unique sensory device that, for example, could penetrate the walls of buildings . . . ." 476 U.S. at 238. Accordingly, the taking of photographs by the EPA did not constitute a search warranting Fourth Amendment protection. *Id.* at 239. In so holding, the Court observed:

> It may well be . . . that surveillance of private property by using highly sophisticated equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed without a warrant. But the photographs here are not

> so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems. An electronic device to penetrate walls or windows so as to hear and record confidential discussions . . . would raise very different and far more serious questions[.]

Id. at 238-39.

In *Dunn*, federal agents investigated the possibility that Dunn was operating a phenyl acetone laboratory on his ranch. 480 U.S. at 297. After utilizing beepers to track deliveries to the ranch and taking aerial photographs of the property, agents made a warrantless entry onto the property. *Id.* The agents crossed one perimeter fence, another interior fence, two barbed wire fences, and a wooden fence, walked under an overhang of a barn, and shone a flashlight through netting in order to peer into the barn. *Id.* at 297-98. The officers did not enter the barn on that occasion, or two subsequent visits, and later obtained a search warrant. *Id.* at 298.

The Court applied the analysis in *Ciraolo* in concluding that the barn was not part of the curtilage and that there was no search. *Id.* at 301-03. Alternatively, the Court found that, even if one accepted for argument's sake that the barn was deserving of some Fourth Amendment protection, the agents did nothing more than look into the barn. *Id.* at 303. Although the agents crossed over a number of fences in order to get close to the barn, the fact that they did not enter the premises, but merely stood

outside and peered in, negated any Fourth Amendment violation. *Id.* at 304-05. Thus the Court found nothing constitutionally offensive in the measures taken by the agents to secure the best view of the interior of the barn. Repeating that "the Fourth Amendment 'has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares,'" the Court found it "irrelevant that the police observation at issue was directed specifically at the identification of marijuana plants growing on an area protected by the Fourth Amendment." *Id.* at 304-05 (quoting *California v. Ciraolo*, 476 U.S. at 213).

The Court next applied the principles set forth in *Ciraolo* to the circumstances presented in *Riley*. Riley maintained a greenhouse near his mobile home. 488 U.S. at 448.

> Two sides of the greenhouse were enclosed. The other two sides were not enclosed but the contents of the greenhouse were obscured from view from surrounding property by trees, shrubs, and the mobile home. The greenhouse was covered by corrugated roofing panels, some translucent and some opaque. At the time relevant to this case, two of the panels, amounting to approximately 10% of the roof area, were missing.

Id. A plurality of the Court concluded that, while the property surveilled was within the curtilage and Riley may have intended his greenhouse to be private, as demonstrated by precautions against ground-level observations, he could not reasonably have expected the greenhouse to be obscured from aircraft overhead. *Id.* at 448-50. Further, "[b]ecause the sides and roof of his greenhouse were left partially open, . . . what was growing

in the greenhouse was subject to viewing from the air." *Id.* at 450. Thus, the Fourth Amendment was not implicated when law enforcement officers flew at an altitude of 400 feet over the greenhouse in a helicopter. *Id.* at 451. In so holding, the Court observed that there was no indication "that the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed." *Id.* at 452.[1]

B. Officer Thielen was in a place he was allowed to be when he made his observations.

Based on the principles explicated above, Officer Thielen was, for Fourth Amendment purposes, in a place he was permitted to be when he made his observations. While on routine patrol duty, he was approached by an individual who informed him that he or she had just walked by a nearby apartment window and observed people sitting around a table packaging what appeared to be a controlled substance. Officer Thielen investigated the report by going to the apartment complex, walking on the common area up to a window of the ground-level

[1] Justice Brennan, joined by Justice Marshall and Justice Stevens, filed a strong dissent, finding the plurality's basis for its holding to be an unjustified broadening of the *Katz* analysis. 488 U.S. at 456. However, Justice Brennan noted that, where a police officer stands on a public road and views evidence of a crime through an open window or a gap in the fence, "the occupant of the home may be said to lack any reasonable expectation of privacy." *Id.* at 459-60.

apartment, and, from a distance of 12 to 18 inches, looking through a gap in the window blinds. Officer Thielen watched for approximately 10 to 15 minutes as three individuals packaged a white powdery substance. Officer Thielen left the complex and reported what he had learned and seen to a member of the local drug task force, who began the process of securing a warrant and advised Officer Thielen, in the interim, to stop the occupants if they attempted to drive away from the complex.

In establishing Officer Thielen's lawful presence, one gains some insight from "source[s] outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois*, 439 U.S. at 143-44 n.12. There can be no doubt that private property immediately adjacent to a private home is as constitutionally protected as the home itself. However, the common areas of an apartment complex are not similarly protected. *See United States v. Holland*, 755 F.2d 253, 255 (2d Cir.) (both the Supreme Court and Congress have recognized distinction between an apartment as an abode and common areas), *cert. denied*, 471 U.S. 1125 (1985); *United States v. Jackson*, 588 F.2d 1046, 1052 (5th Cir.) ("what is reasonable in one setting may be unreasonable in another"), *cert. denied*, 442 U.S. 941 (1979); *State v. Clarke*, 242 So. 2d 791, 793 (Fla. App. 1971) ("what constitutes an unreasonable invasion varies with the character of the residence").

Like a motel, an apartment complex shares halls, lobbies, sidewalks, and yards, all designated as common areas available equally to residents and guests, without the need for permission by any one individual tenant. As such, the majority of states have agreed that presence on

the common area of an apartment complex does not implicate the Fourth Amendment. *See, e.g., People v. Berutko*, 453 P.2d 721, 725 (Cal. 1969) (common areas of apartment buildings are available to other tenants as well as others having legitimate business on the premises); *People v. Becker*, 533 P.2d 494, 496 (Colo. 1975) (no reasonable expectation of privacy as to items viewed from common area of apartment building); *State v. Brown*, 503 A.2d 566, 570 (Conn. 1986) (tenant has constitutional expectation of privacy only in areas where his use is exclusive); *Brown v. United States*, 627 A.2d 499, 503-04 (D.C. 1993) (no reasonable expectation of privacy in semi-public area of apartment building); *State v. Clarke*, 242 So. 2d at 794 (residents of an apartment "must be held to an expectation that those using the common facilities of the building would come across the window and look inside"); *Espinoza v. State*, 454 S.E.2d 765, 768-69 (Ga. 1995) (multi-unit apartment residents have no reasonable expectation of privacy in readily accessible common area); *State v. Hook*, 587 P.2d 1224, 1227 (Haw. 1978) (investigative entry by officer into common area between buildings not a search); *People v. Smith*, 604 N.E.2d 858, 864 (Ill. 1992) (no expectation of privacy in common areas shared by other tenants, guests, and invitees); *Latham v. Sullivan*, 295 N.W.2d 472, 476 (Iowa App. 1980) (looking into apartment window from outside route used to reach apartment door not a search); *State v. Ragsdale*, 381 So. 2d 492, 497 (La. 1980) (reasonable expectation of privacy only in completely enclosed patio outside apartment unit); *Commonwealth v. Acosta*, 627 N.E.2d 466, 468 (Mass. 1993) (no search where police observe activity from common area of apartment complex); *State v. Crider*, 341 A.2d 1, 4 (Me. 1975)

(entry by police officer in performance of his duties into accessible common hallway of multiple dwelling not a search); *State v. Macke*, 594 S.W.2d 300, 307 (Mo. App. 1980) (observation through open door from common area violated no rights of defendant); *State v. Taylor*, 401 N.E.2d 459, 461-62 (Ohio App. 1978) (no distinction between police officer using common walkway and use by other occupants of apartment complex or their invitees); *State v. Eddy*, 519 A.2d 1137, 1141 (R.I. 1987) (accessible hallway of apartment building is a public place).

The majority of federal circuits are in agreement with this view. *See, e.g., United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976) (no reasonable expectation of privacy in condominium's underground parking garage, "a well traveled common area of an apartment house or condominium"); *United States v. Fields*, 113 F.3d at 321 (defendants had no legitimate expectation of privacy in common area accessible to other tenants in multi-family apartment building); *United States v. Holland*, 755 F.2d at 255 ("common halls and lobbies of multi-tenant buildings are not within an individual tenant's zone of privacy even though they are guarded by locked doors"); *United States v. Clark*, 67 F.3d 1154, 1162 (5th Cir. 1995) (no reasonable expectation of privacy in apartment walkway); *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991) (tenant has no reasonable expectation of privacy in common areas of apartment building); *United States v. Acevedo*, 627 F.2d 68, 69 n.1 (7th Cir.) ("well-settled that observations from the common areas of multi-unit dwellings ordinarily do not violate a resident's reasonable expectation of privacy"), *cert. denied*, 449 U.S. 1021 (1980); *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977) (no reasonable expectation of privacy in

apartment building's common hallways equally "available for the use of residents and their guests, the landlord and his agents, and others having legitimate reasons to be on the premises").[2]

Under the facts of this case, Officer Thielen was permitted in the course of his law enforcement duties to enter the common area of the apartment complex. When he made his observations of the drug packaging activities within the apartment, he was in a place and at a vantage point he was permitted to be.[3] Because no legitimate

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[2] In some instances, courts have reasoned that a tenant's ability to control access to common areas would dictate a different result. *See, e.g., United States v. Corriger*, 541 F.2d 545, 550 (6th Cir. 1976); *United States v. Booth*, 455 A.2d 1351 (D.C. 1983); *People v. Trull*, 380 N.E.2d 1169 (Ill. 1978); *State v. DiBartolo*, 276 So.2d 291 (La. 1973); *Garrison v. State*, 345 A.2d 86 (Md. 1975); *State v. Harnisch*, 931 P.2d 1359 (Nev. 1997). This notion has no application to the instant case where no claim can be made that the tenants exercised any control over the common area.

[3] Even if one assumes arguendo that Officer Thielen was technically trespassing, the Fourth Amendment does not preclude the intrusion. "The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated." *United States v. Karo*, 468 U.S. at 712-13. *Accord Oliver v. United States*, 466 U.S. 170, 183-84 (1984) (trespass by police officers onto private property, but no Fourth Amendment violation). *See also Florida v. Riley*, 488 U.S. at 459 (Brennan, J., dissenting) ("we have consistently refused to equate police violation of the law with infringement of the Fourth Amendment"); *State v. Hook*, 587 P.2d at 1227 (immaterial whether entry onto common area may have constituted a technical trespass); *United States v.*

(continued...)

privacy interest was offended, Officer Thielen's actions in walking up to a window on the common area of an apartment complex did not call for invocation of any Fourth Amendment sanctions.

C. Officer Thielen's observations into the apartment were neither aided nor enhanced.

Katz clarified that determination of Fourth Amendment issues "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." 389 U.S. at 353. The Fourth Amendment "protects people, not places." *Id.* at 351-53. However, the concept of physical space remains a consideration in determining the applicability of Fourth Amendment analysis. *United States v. Dunn*, 480 U.S. at 300. Private residences, including an apartment, merit special protection.

> [P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. . . . Searches and seizures inside a home without a warrant are

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[3](...continued)

Cruz Pagan, 537 F.2d at 558 (whether or not agents' entry was a trespass not the relevant inquiry); *United States v. Fields*, 113 F.3d at 322 (ultimate focus of Fourth Amendment analysis is not on concept of trespass, but on expectations of privacy); *United States v. McGrane*, 746 F.2d 632, 634-35 (8th Cir. 1984) (agent's status as trespasser of no consequence); *United States v. Nohara*, 3 F.3d 1239, 1242 (9th Cir. 1993) (no expectation of privacy in common areas of building whether or not officer trespasses).

> presumptively unreasonable absent exigent circumstances.

United States v. Karo, 468 U.S. at 714-15 (1984). Nonetheless, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *United States v. Katz*, 389 U.S. at 351.

"As a general proposition, it is fair to say that when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a 'search' within the meaning of the Fourth Amendment." 1 Wayne R. LaFave, *Search and Seizure* § 2.2(a), at 395 (3d ed. 1996). In this case, Officer Thielen did nothing extraordinary in the course of viewing the interior of the apartment. Respondents contend that by closing the window blinds, they exhibited a subjective expectation that the activities conducted in the room would be private. The existence of a noticeable gap in the window blinds allowing for observation negates that expectation.

Residents, invitees, and others use the common area of a multi-unit apartment complex with sufficient regularity that any expectation of privacy from observation through a gap in window blinds is not one that society is prepared to recognize as reasonable.

> "Peering through a window or a crack in a door or a keyhole is not, in the abstract, genteel behavior, but the Fourth Amendment does not protect against all conduct unworthy of a good neighbor. Even surveillance of a house to see who enters and leaves is something less than good manners would permit. But it is the duty of a policeman to investigate, and

> we cannot say that in striking a balance between the rights of the individual and the needs of law enforcement, the Fourth Amendment itself draws the blinds the occupant could have drawn but did not."

People v. Berutko, 453 P.2d at 726 (quoting *State v. Smith*, 181 A.2d 761 (N.J.), *cert. denied*, 374 U.S. 835 (1962)). *See also People v. Becker*, 533 P.2d at 496 (observation from common area in front of apartment through uncurtained part of window adjacent to front door not a search); *State v. Clarke*, 242 So.2d at 794 (no expectation of privacy "with relation to what they did inside the window within easy view of any person on that fire escape"); *People v. Wright*, 242 N.E.2d 180, 184 (Ill. 1968) (looking into dwelling from common area of passageway of apartment complex not a search), *cert. denied*, 395 U.S. 933 (1969); *Latham v. Sullivan*, 295 N.W.2d at 476 (no search to look in apartment window from outside route to front door); *Commonwealth v. Hernley*, 263 A.2d 904, 907 (Pa. Sup. Ct. 1970) (in order to establish expectation of privacy, "it was incumbent on the suspect to preserve his privacy from visual observation .... The law will not shield criminal activity from visual observation when the actor shows such little regard for his privacy."). *Accord United States v. Taylor*, 90 F.3d 903, 908-09 (4th Cir. 1996) (where vertical blinds not fully closed and position of blinds did not preclude view of room from outside, defendants did not exhibit an expectation of privacy); *United States v. Acevedo*, 627 F.2d at 69 n.1 (tear in inside covering of window indicated defendant "no longer had an expectation that those who passed the window refrain from looking in.").

Contrary to the opinion of the Minnesota Supreme Court, the actions of Officer Thielen in this case were far

from extraordinary. A brief look at readily observable activity through the window from the common area of the apartment complex was, for all practical purposes, the same as the police surveillance of a backyard or greenhouse, whether from the ground or air. *See California v. Ciraolo*, 476 U.S. at 215 ("The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye."); *Florida v. Riley*, 488 U.S. at 449-50 (same); *United States v. Dunn*, 480 U.S. at 304 (same with respect to ground surveillance).

This was not a case of "a policeman walking down the street carrying a[n activated] parabolic microphone capable of picking up conversations in nearby homes." *United States v. Karo*, 468 U.S. at 712. It was not "surveillance of private property by using highly sophisticated equipment not generally available to the public, such as satellite technology." *Dow Chemical Co. v. United States*, 476 U.S. at 238. Nor was it the government surreptitiously using an electronic device to obtain information "that it could not have obtained by observation from outside the curtilage of the house." *United States v. Karo*, 468 U.S. at 715. It did not include utilization of even the most common enhancement devices, such as searchlights, binoculars, or telescopes.

It was, in fact, observation from a common area using nothing more than the naked eye. That Officer Thielen turned his body or cocked his head to see has no constitutional significance. Whether an officer constitutionally intrudes on an individual's privacy interest cannot reasonably be held to depend upon the chance factor of the location of the uncovered portion of the window.

In sum, Officer Thielen was able to see into the apartment from a public vantage point. Therefore, Respondents had no reasonable expectation of privacy in their drug packaging activities. Under the correct constitutional analysis, Officer Thielen's actions did not constitute a search warranting Fourth Amendment sanctions.

CONCLUSION

For the reasons stated, the judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MINNESOTA,

Petitioner,

—v.—

WAYNE THOMAS CARTER and
MELVIN JOHNS,

Respondents.

ON WRIT OF *CERTIORARI* TO
THE MINNESOTA SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE MINNESOTA CIVIL LIBERTIES UNION, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The Minnesota Civil Liberties Union is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many Fourth Amendment cases. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence, and expertise of the criminal defense bar; and to promote the proper and fair administration of criminal justice. Composed of more than 9,000 attorneys and 28,000 affiliate members in 50 states, NACDL is recognized by the American Bar Association as an affiliate organization. It also has full representation in the ABA's House of Delegates. NACDL strives to defend the liberties guaranteed by the Bill of Rights.

STATEMENT OF THE CASE

Around 8:00 p.m. on May 15, 1994, an anonymous and previously unknown informant told police officer Jim

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Thielen that people were sitting in an apartment "bagging" a white powdery substance. The informant identified the premises and also told Thielen that the occupants had driven a blue four-door Cadillac with Illinois license SGD 896.[2] J.A. A8.

Based solely on this tip, Thielen decided to investigate. He left the common walkway and entered a grassy area near the ground-level window of the suspected apartment. He then walked behind some short bushes in front of the window and stood approximately 12 to 18 inches from the window. Although the window blinds were closed, Thielen looked through gaps in the blinds to see what was going on inside the apartment. He observed three persons, two males and a female, near a kitchen table. The males were placing a white powdery substance into plastic bags; the female was sealing the bags. *Id.* at A9.

After watching the conduct inside the apartment for nearly 15 minutes, Thielen had another conversation with the informant who indicated, for the first time, that there might be a gun inside the apartment. Thielen then called the South Metro Drug Task Force. He was instructed to stop and secure the Cadillac if anyone attempted to move it. Around 10:30 p.m. two males, later identified as respondents Carter and Johns, drove the Cadillac out of the parking lot, when it was immediately stopped by the police, who saw a weapon on the floor. Respondents were arrested and the Cadillac was towed to a police station. A subsequent search of the car pursuant to a warrant disclosed cocaine.

[2] It is not clear how the informant knew which car respondents had used if, as the Minnesota Supreme Court opinion suggests, the respondents were already in the apartment when they were observed by the informant.

The police then returned to the apartment, and arrested Kimberly Thompson, the lessee of the premises. The following day the police executed a search warrant and found cocaine residue in the apartment. *Id.* at A9-10.

Respondents' motion to suppress the evidence seized from the apartment and the car was denied by the trial court. Specifically, the trial court ruled that respondents lacked standing to contest the search because respondents did not live in the apartment, they were not overnight guests, and neither was related to the lessee. The trial court also ruled that no search had occurred under the Fourth Amendment because Thielen was standing on a common walkway when he peered through the closed blinds into the apartment. *Id.* at E7, E10. Respondents were later convicted and sentenced on narcotics charges.

Both convictions were ultimately reversed by the Minnesota Supreme Court. First, it ruled respondents had standing to contest Thielen's search. As the court explained, society "recognize[s] as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity." *Id.* at A18.

Second, the Minnesota Supreme Court ruled Thielen's conduct was a search under the Fourth Amendment. Without deciding whether Thielen stood in a common area that was outside of the curtilage of the apartment, the court rejected petitioner's argument that Thielen's lawful presence determined whether his observation was a search. Instead, the court stressed that, by climbing over bushes and positioning his face within 12 to 18 inches of the window to peer through gaps in the closed blinds, Thielen had taken "extraordinary measures" to look inside a private home. *Id.* at A22. For that reason, the court held, Thielen's conduct was a search under the Fourth Amendment. Because neither

warrant nor probable cause authorized the intrusion, the search was unreasonable. *Id.* at A23-24.

This Court granted the petition for a writ of *certiorari* to decide two questions: First, does an invitee into a home enjoy a legitimate privacy interest under the Fourth Amendment when his connection to the premises is to assist the homeowner in criminal conduct? Second, is unaided observation of a home which occurs in a public place outside of the curtilage a search under the Fourth Amendment?

SUMMARY OF ARGUMENT

The state's approach to this case rests on a view of the Fourth Amendment that is simple, but wrong. Searching for a bright-line rule, petitioner argues that a house guest never has standing to challenge the unconstitutional search of a home unless the guest is staying overnight. The Court has consistently rejected such *per se* rules in the Fourth Amendment context, insisting instead on "a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). *See Minnesota v. Olson*, 495 U.S. 91, 95 (1990). Moreover, in making that determination, this Court has examined the historic traditions and modern norms recognized by society. *See id.*

Applying those understandings here, there is abundant support for the Minnesota Supreme Court's conclusion that guests and invitees have a legitimate expectation of privacy while in the home of their hosts. The practice of inviting visitors into one's home was prevalent in colonial society and remains an important feature of modern life. The home is a place where families and friends congregate, and guests and visitors share private moments. Its privacy is explicitly protected by the text of the Fourth Amendment.

In addition, petitioner's contention that visitors lack any expectation of privacy unless they stay overnight is inconsistent with *Alderman v. United States*, 394 U.S. 165 (1969), which recognizes that house guests are protected by a right of conversational privacy. Just as it is reasonable for house guests to assume that their conversations will not be monitored by uninvited ears, it is equally reasonable for those same house guests to assume that their behavior will not be monitored by uninvited eyes. Nothing in *Alderman* suggests that these fundamental Fourth Amendment freedoms turn on the duration of the house guest's visit.

Furthermore, the criminal nature or purpose of one's conduct is irrelevant when determining the existence of a legitimate privacy interest in a home. Expectations of privacy in a home do not ebb and flow depending upon what police find (or hope to discover) through their intrusion. Nor can privacy interests in a home be measured by whether a visit is brief and limited. The sense of security and physical integrity of a home is rendered meaningless when a person on a brief visit is denied protection against arbitrary police intrusions, but an overnight visit by that same person is granted protection against unlawful intrusions.

On the merits, the Minnesota Supreme Court was correct in holding that Officer Thielen's observations constituted a search under the Fourth Amendment. Petitioner argues that whether Thielen's observation constituted a search depends on the precise location where he was standing and whether he used a sophisticated surveillance device. Under this Court's holdings, however, neither of these factors is controlling when defining one's privacy interest in a home. Thielen's snooping violated the Fourth Amendment because it exposed the intimate details associated with use of the home to police inspection without a warrant.

ARGUMENT

I. RECOGNIZING THAT GUESTS AND INVITEES HAVE A LEGITIMATE EXPECTATION OF PRIVACY IN A HOME IS CONSISTENT WITH THE TEXT, HISTORY, AND PURPOSE OF THE FOURTH AMENDMENT

The text and history of the Fourth Amendment demonstrate that a person's home is a sacred place. Early Americans viewed entry of their houses by government officers as an invasion of the sanctity of their homes. As one historian has explained:

> In 1787-88, commentators on the Constitution denounced general warrants and searches not just because they were general but because they abridged the security that houses afforded from unwelcome intrusion. That houses were castles was the most recurrent theme of those commentaries.[3]

The Fourth Amendment's condemnation of general warrants was, for that reason, originally designed to protect the privacy of the home.

> The concern with warrants, in short, embraced a concern with houses, which encapsulated still deeper concerns. The amendment's opposition to unreasonable intrusion, by warrant and without warrant, sprang from a popular opposition to the surveillance and divulgement that intrusion made possible. Open your front door, ran the argument, and the extent of federal invasion will be infinite.[4]

Consistent with history, this Court has repeatedly ruled that houses receive the most scrupulous protection under the Amendment.[5] Recognizing that a visitor has a legitimate privacy interest in the home of a host advances the textual and historic objectives of the Amendment. First, acknowledging a visitor's privacy interest reinforces the inherent right of homeowners to invite guests to share the comfort and security of their homes. And, it is consistent with a long tradition in this country of admitting visitors in the home.

That tradition has deep historical roots in this country. "Visiting was a continual pastime in slow-paced colonial society, and diaries were filled with notes of the exchange of visits." David H. Flaherty, PRIVACY IN COLONIAL NEW ENGLAND 89 (1972). In colonial New England, for example, invited guests "were warmly welcomed into the intimacy of the family." *Id.* at 92.

Moreover, individuals often relied on the hospitality of complete strangers when they traveled away from home.

> Visitors ranged from neighbors and others in the community to relatives and complete

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[3] William Cuddihy, "The Fourth Amendment: Origins and Original Meaning, 602-1791," at 1545-46 (1990)(unpublished Ph.D. dissertation, Claremont Graduate School). Justice O'Connor describes Cuddihy's scholarship as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995).

[4] Cuddihy, *supra* at 1546 (footnote omitted).

[5] *See, e.g., United States v. Karo*, 468 U.S. 705, 714-15 (1984); *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984); *Payton v. New York*, 445 U.S. 573, 589 (1980); *id.* at 601 (noting the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic")(footnote omitted).

> strangers. Since they were admitted to the bosom of the family, visitors might witness some intimate activities. Such persons as Samuel Sewall, the prominent public servant, engaged in a constant round of visitations. In Westborough the minister Parkman complained that "company are here every Day, and not a few which is a great Interruption to me." In Boston John Andrews, a merchant, boasted of his wife's "friends which are not a few, I do assure you, as Lord North has scarcely a greater Levee than she, especially in pleasant weather; its quite common for her to have from six to ten visitors of a forenoon."

Id. at 89-90.

In short, the practice of inviting guests or visitors into a home was an established social custom by the time the Fourth Amendment was ratified. Recognizing a visitor's privacy interest in a home thus "preserve[s] that degree of respect for the privacy of persons and the inviolability of their [homes] that existed" when the Fourth Amendment was adopted. *Minnesota v. Dickerson*, 508 U.S. __, __, 113 S.Ct. 2130, 2139 (1993)(Scalia, J., concurring).

It is also consistent with the underlying purpose of the Fourth Amendment. As this Court has repeatedly stated: "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton*, 445 U.S. at 586 (footnote omitted). The requirement that police obtain a judicial warrant before intruding into a home was not intended to shield criminals or probative evidence from the lawful reaches of officers. Rather, "[t]he warrant requirement . . . is imposed to protect the home." *Harris v. New York*, 495 U.S. 14, 20 (1990); *id.* at 17 (the rule of *Payton* "was designed to protect the physical integrity of the home"). If a warrantless search of a home subverts the physical integrity of the home even when the homeowner is absent,[6] then a similar search is equally destructive of the home's physical integrity when an invitee is sharing the privacy and security of the home. Petitioner's claim that an invitee has no privacy interest in a home ignores the benefits and value -- for both homeowner and visitor -- of having visitors in a home. In sum, the presence of a visitor within a home in no way diminishes the sanctity of the home against police intrusions that are otherwise *per se* unreasonable under the Fourth Amendment.

Here, Officer Thielen's scrutiny of Thompson's home had all of the traits of an unreasonable search which invaded respondents' privacy expectations.[7] No warrant authorized

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[6] *See Payton*, 445 U.S. 573 (warrantless entry to arrest Payton violates the Fourth Amendment even though Payton was absent at the time of the entry).

[7] Officer Thielen's conduct would have impaired the privacy expectations of early Americans. Professor Flaherty notes that:

> Eavesdroppers and Peeping Toms also threatened the privacy of a home. Such offenders were not often prosecuted, since the matter could be handled in a more practical and perhaps more satisfying manner by the person who discovered the culprit . . . . Peeping Toms were similarly held up to ignominy at law. A New Haven Man won a slander and defamation suit against a fellow citizen who had accused him of coming "in the night to peep in at his window." John Severns of Salisbury entered a complaint against two young men in 1680, "for hovering about his house, peeping in at the window." Although their intention was probably to entice his servants out of the house, Severn's ideas about privacy obviously did not include such liberties.

Flaherty, *supra* at 89 (footnotes omitted).

Thielen's search, there was no probable cause for the intrusion, Thompson did not consent to the search, and no exigency justified Thielen's conduct. In other words, Thielen's snooping undermined the integrity of the home for both Thompson and her visitors. Having visitors in the home did not lessen the unreasonableness of Thielen's search.

Furthermore, Thielen's conduct jeopardized the societal interest in protecting the privacy of homes against unreasonable intrusions. As in the case of overnight guests, society has a legitimate interest in ensuring that short-term guests are protected against unreasonable searches and seizures. "We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home." *Olson*, 495 U.S. at 98. The logic that recognized that an overnight guest has a legitimate expectation of privacy in the home equally applies to short-term guests.[8] That the visitor lacks ultimate control over the home is unimportant; the crucial "point is that hosts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." *Id.* at 99.

[8] *Olson*, 495 U.S. at 96 (rejecting the state's multi-factor test for deciding whether an overnight guest has a sufficient nexus with a home to enjoy constitutional protection, and finding "Olson's status as an overnight guest is alone enough to show that he had an expectation privacy in the home that society is prepared to recognize as reasonable"); *see also United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997)("*Olson* stands for the proposition that any guest, in appropriate circumstances, may have a legitimate expectation of privacy when he is there 'with the permission of his host, who is willing to share his home and his privacy with his guest'")(quoting *Olson*, 495 U.S. at 99).

II. DENYING GUESTS PRIVACY INTERESTS IN A HOME CONTRADICTS THE PRINCIPLE THAT ALL PERSONS HAVE A RIGHT OF CONVERSATIONAL PRIVACY WHILE IN THE HOME OR OFFICE OF ANOTHER PERSON

Alderman v. United States, 394 U.S. at 176, made clear that a violation of the Fourth Amendment occurs when government officials "unlawfully overhear[] conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations."[9] *Alderman*'s ruling that a defendant could contest the illegal monitoring of his conversations that occurred on another's premises was the inevitable extension of the rule announced in *Katz v. United States*, 389 U.S. 347 (1967), that conversational privacy is protected by the

[9] In a footnote, *Alderman* stated that "[t]hose who converse and are overheard [by illegal electronic surveillance] when the owner is not present also have a valid objection unless the owner of the premises has consented to the surveillance." *Id.* at 179, n.11. *Alderman*'s ruling on the standing of a defendant to contest illegal wiretapping or eavesdropping that monitors his conversation while in the home or office another person paralleled the holding in *Silverman v. United States*, 365 U.S. 505 (1961)(right to be secure in a home violated when petitioners' conversations were overheard by "spike" microphone that invaded the walls of private premises), and reflected the earlier views of Justices Harlan and White. *See Berger v. New York*, 388 U.S. 41, 103 (1967)(Harlan, J., dissenting)("I would conclude that, under the circumstances here, the recording of a portion of a telephone conversation to which petitioner was a party would suffice to give him standing to challenge the validity under the Constitution of the [eavesdropping device installed in another person's office]"); *id.* at 107 (White, J., dissenting)("Since Berger was rightfully in Steinman's office when his conversations were recorded through the Steinman eavesdrop, he is entitled to have those recordings excluded at his trial if they were unconstitutionally obtained").

Fourth Amendment. No precedent since has questioned this aspect of *Alderman*.

The petitioner, however, insists that respondents have no expectation of privacy against the police surveillance *sub judice*. Petitioner has not asked that *Alderman* be reconsidered. Thus, under petitioner's analysis, if either respondent had used Thompson's telephone to discuss acquiring cocaine and an illegal wiretap recorded their conversations, or if an unlawfully installed eavesdropping device in Thompson's kitchen had captured respondents' conversations concerning narcotics, the respondents' legitimate expectations of privacy would have been infringed, and *Alderman* would have required the fruits of these unlawful searches and seizures to be excluded from respondents' trial. *Alderman*, 394 U.S. at 176-77. But here, petitioner argues, Thielen's search caused no constitutional harm to respondents because they lacked an expectation of privacy in Thompson's home. In effect, petitioner proposes a constitutional rule that protects respondents' conversations while in a home from unlawful intrusions, but not their private acts in that same home.

This argument ignores *Alderman*. Whether respondents have an expectation of privacy in a home cannot turn on a distinction between conduct and conversation. *See id.* at 179-80 (when assessing a homeowner's privacy interest, there is no difference between a police entry of a home to install a listening device and a traditional police entry to view or seize tangible property). As *Alderman* explained, the holding in *Katz* was not "intended to withdraw any of the protection which the [Fourth] Amendment extends to the home or to overrule the existing doctrine, recognized at least since *Silverman*, that conversations as well as property are excludable from the criminal trial when they are found to be the fruits of an illegal invasion of the home." *Alderman*, 394 U.S. at 180.

Petitioner's position not only disregards the teaching of *Alderman*, it is bad constitutional law because no neutral principle justifies a different result depending upon whether police conduct monitors private conduct in the home rather than private conversation. Nor has this Court ever recognized such a distinction when defining expectations of privacy. Thus, the Court has recognized that the Fourth Amendment protects "against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects,'" *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). But the Court has also recognized that the Fourth Amendment bars testimony of activities observed by police officers during an unlawful invasion of a home. *Id. See also McDonald v. United States*, 335 U.S. 451 (1948) (excluding evidence that officers discovered after climbing through landlady's window of roominghouse and standing on a chair in a hallway to look through the transom of defendants' room). Because a visitor's privacy interest in a home parallels the privacy interest a visitor has when using the telephone of a host or while conversing inside the home of a host, the ruling below properly recognized respondents' right to contest Thielen's search.

A. The Criminal Nature Of A Visitor's Conduct Is Irrelevant When Determining Whether The Visitor Has A Legitimate Privacy Interest In A Home

Petitioner insists that respondents "seek Fourth Amendment protection for their illegal activities in the apartment of a co-conspirator." Brief for Petitioner at 14. According to petitioner, because the Fourth Amendment was not designed to protect criminal conduct, the nature of a defendant's activity "is worthy of inquiry" when determining whether he may claim Fourth Amendment protection. *Id.* at 22-23.

Petitioner is wrong. First, the court below did not rule, as suggested by petitioner, that criminal conduct in concert with a host is enough to confer standing. Brief for Petitioner at 9, 16-20. Nor did it find that society is willing to accept drug dealing as reasonable behavior. The Minnesota Supreme Court merely found that respondents had a sufficient nexus with Thompson's residence to contest police surveillance that disclosed private conduct within a home.

Petitioner's description of Fourth Amendment law is also mistaken. Petitioner cites no precedent supporting its assertion that the criminal nature of one's conduct is relevant for determining whether a defendant possesses a privacy interest in a home. In fact, a similar argument was rejected in *United States v. Jeffers*, 342 U.S. 48 (1951), a case not cited by petitioner. In *Jeffers*, the government claimed that, because of its contraband nature, Jeffers had no standing to object to the seizure of narcotics taken during a warrantless search of his hotel room. *Id.* at 52-53. *Jeffers* dismissed this argument. It explained that Congress' authority to abrogate property rights in narcotics was not intended to undermine the ability of criminal defendants to assert legitimate Fourth Amendment claims when police unlawfully invade their privacy. *Id.* at 53-54. *See also Chapman v. United States*, 365 U.S. 610 (1961)(finding that, even when a house is used for the sole purpose of distilling contraband whiskey, tenant retains privacy interest against forcible police entry and search authorized by landlord).

If petitioner's theory is correct that the criminal nature of a defendant's activity is relevant when measuring one's Fourth Amendment standing, then guilty people would never have standing.[10] More importantly, this Court has repeatly ruled that expectations of privacy do not depend on whether the police expect to find (or do discover) criminal evidence as a result of their search. For example, in *Katz*, FBI agents had good reason to believe that Katz was using the telephone to place illegal wagers. Their warrantless wiretap was limited to the specific purpose of establishing the illegal nature of Katz' telephone conversations. Thus, even though FBI agents had probable cause to believe that Katz was engaged in "conversational contraband" at the time of their surveillance, this fact was inconsequential for determining whether Katz could justifiably rely on the privacy of the telephone booth he was using. *Katz*, 389 U.S. at 351-53.

Similarly, in *Olson*, when deciding whether an overnight guest had sufficient interest in a home to contest a warrantless entry for his arrest, this Court did not focus upon the circumstances of the defendant's visit to the home. Had the Court done so, it might have noted Olson's status as a person who evaded lawful authority, a crime in Minnesota.[11] In *Olson*, as in *Katz* and *Rakas*, the criminal nature of the defendant's conduct or purpose was immaterial in resolving whether the police intrusion violated a legitimate expectation of privacy. This is as it should be because the "guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike." *McDonald*, 335 U.S. at 453; *Trupiano v. United States*, 334 U.S.

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[10] *Cf.* 5 Wayne F. LaFave, SEARCH AND SEIZURE §11.3(b), 144 (3d ed. 1996)(noting that, although a few lower courts have denied standing if (continued...)

[10] (...continued)
the defendant's "presence was for the purpose of engaging in criminal conduct . . . or . . . to avoid detection or capture by the police," the correct view "is to the contrary, for to deny standing merely because it turns out the defendant had a criminal purpose is in sharp conflict with the rationale underlying the exclusionary rule").

[11] *See* Minn. Stat. §609.487(3) (1981)(fleeing a peace officer in a motor vehicle). This Court assumed that probable cause existed for Olson's arrest. 495 U.S. at 95, n.1.

699, 709 (1948)("The Fourth Amendment was designed to protect both the innocent and the guilty from unreasonable intrusions upon their right of privacy while leaving adequate room for the necessary processes of law enforcement").

Rules that govern searches and seizures are based on objective facts and standards, not subjective motives or what is ultimately discovered by the police. Thus, the Court has noted that "a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States v. DiRe*, 332 U.S. 581, 595 (1948)(footnote omitted). Expectations of privacy are measured in a similar fashion. "Expectations are formed on the basis of objective appearances, not on the basis of facts known only to others . . . . The [person's] expectation of privacy is either inherently reasonable or it is inherently unreasonable." *United States v. Karo*, 468 U.S. at 724 (O'Connor, concurring in part and concurring in the judgment). Accordingly, the court below correctly ignored respondents' criminal acts when deciding whether they had a legitimate expectation of privacy in a home.

B. There Is No Principled Reason For A *Per Se* Rule That Denies A Visitor Privacy Interests In A Home, While Protecting The Same Privacy Interests Of An Overnight Guest

Petitioner submits that "[v]isitors cannot rely upon their host's privacy interest in a residence to establish a protected privacy interest under the Fourth Amendment." Brief for Petitioner at 11. The United States, as *amicus curiae*, argues that, when a person's connection with a place is "only brief and limited, he lacks a socially recognized interest in maintaining the privacy of that place." Brief of United States at 17.

The arguments of petitioner and its *amici* misconstrue this Court's Fourth Amendment rulings since the seminal case of *Katz v. United States*. They propose a *per se* rule that excludes visitors from relying on the protection traditionally afforded by the home under the Fourth Amendment. They emphasize that visitors generally, and respondents specifically, cannot claim a property interest in their host's home because they exercise no dominion or control over it. *See* Brief of Petitioner at 14; Brief of United States at 19. But, just as *Katz* "liberates courts from the trespass straightjacket" when determining whether a police intrusion triggers constitutional scrutiny,[12] this Court's subsequent cases have rejected talismanic formulas for determining the scope of the Fourth Amendment's coverage.[13]

A homeowner's "sense of security," *United States v. White*, 401 U.S. 745, 786 (Harlan, J., dissenting), is undeniably damaged when a police officer is discovered peeking through the closed blinds of a bedroom or kitchen window. Similarly, when visitors are invited to enjoy the privacy and security of another's residence -- for example, when a

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[12] LaFave, *supra*, §2.3(c) at 492.

[13] *See, e.g., United States v. Padilla*, 508 U.S. 77, 78 (1993)(rejecting co-conspirator test for deciding who may contest the lawfulness of a search or seizure); *Olson*, 495 U.S. at 99 (right to exclude is not determinative of an overnight guest's privacy interest in a home); *Rakas*, 439 U.S. at 147 (rejecting "blind adherence to a phrase [*i.e.*, legitimately on the premises] which at most has superficial clarity and which conceals underneath that thin veneer all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment"). *Cf.* Anthony G. Amsterdam, "Perspectives On The Fourth Amendment," 58 Minn.L.Rev. 349, 385 (1974)("In short, the common formula for *Katz* fails to capture *Katz* at any point because the *Katz* decision was written to resist captivation in any formula").

neighbor is asked to share a cup coffee inside a host's kitchen to discuss family matters, or when a college student is invited to a classmate's dormroom to provide advice on school or dating -- the visitor does not expect to be spied upon by officers peeking through the gaps of closed blinds. Put another way, the visitor reasonably anticipates that his privacy and security "will not be disturbed by anyone but his host and those his host allows inside." *Olson*, 495 U.S. at 99; *see also Mancusi v. DeForte*, 392 U.S. 364, 369 (1968)(union member's privacy interest in office is not compromised by the fact that he shared office with other members).

The United States, as *amicus*, proffers a distorted view of constitutional and societal norms when it states that "one who merely visits the home of another and does not stay there overnight ordinarily arrives without any expectations regarding the admission or exclusion of others." Brief of United States at 17. First, there is no evidence in this case that Thompson extended such invitations during respondents' stay in her home.[14] Moreover, Thompson surely did not consent to Officer Thielen's snooping. Thus, the fact that Thompson was "free to admit or exclude others," Brief of United States at 17-18, is beside the point.

Second, this Court has recognized a critical (and constitutional) difference between a nonconsensual police intrusion and a consensual intrusion by private parties not affiliated with the government. *See Marshall v. Barlow's, Inc.*,

[14] *See DeForte*, 392 U.S. at 369-70 (union official's standing is not affected by the possibility that his superiors might have consented to a search of the office, regardless of DeForte's wishes, because "it is not claimed that any such consent was given, either expressly or by implication").

436 U.S. 307, 314-15 (1978). The latter "furnishes no justification for federal agents to enter a place of business from which the public is restricted [in order to] to conduct their own warrantless search," *id.* at 315 (footnote omitted). Likewise, a visitor's expectation that private acts in a home will not be subject to police surveillance is unaffected by the ability of the host to invite others inside.

Third, expectations of privacy are assessed in qualitative, and not quantitative, terms. *See Arizona v. Hicks*, 480 U.S. 321, 325 (1987)("A search is a search, even if it happens to disclose nothing but the bottom of a turntable"). That is why even a brief and single use of a telephone entitles a person to assume that "the words he utters into the mouthpiece will not be broadcast to the world." *Katz*, 389 U.S. at 352. The same qualitative analysis should apply when determining the privacy interests of visitors in a home: one's entitlement to constitutional protection should not depend on the length of a visit or whether one stays until the sun rises. For instance, under the formulaic analysis of petitioner and its *amici*, a homeowner's sexual partner would have no expectation of privacy unless he spent the night and no standing to object if the police peered through the closed blinds of a bedroom window.

The privacy protections of the Fourth Amendment are not so ephemeral. As this Court has observed, "private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." *Karo*, 468 U.S. at 714.

III. NONCONSENSUAL POLICE SURVEILLANCE THAT REVEALS INTIMATE DETAILS OF A HOME IS A SEARCH UNDER THE FOURTH AMENDMENT

Petitioner argues that Officer Thielen's observation was not a search under the Fourth Amendment because it was "made from a location in a common area outside of the curtilage without the use of sophisticated surveillance devices." Brief for Petitioner at 32. The United States, as *amicus*, shares this view and argues that even when officers view objects inside a home, there is no search as long as their observations take place outside the curtilage in an area accessible to members of the general public. Brief of United States at 25. This Court, however, has never endorsed the *per se* rule that a police officer's unaided observation of a home from a lawful location is, by definition, outside the scope of the Fourth Amendment.

A. A Majority Of The Court Has Rejected The Notion That The Privacy Interest Associated With A Home Is Always Unreasonable If Surveillance Occurs From A Location Where An Officer Has A "Right To Be"

Florida v. Riley, 488 U.S. 445 (1989), is the Court's most recent precedent concerning expectations of privacy where police scrutinize an area surrounding the home. Petitioner and its *amici* read *Riley* to stand for the rule that unaided observation of a home from an area open to the public is not a search. This reading of *Riley* is mistaken.

In *Riley*, Justice White's plurality opinion held that helicopter surveillance of a greenhouse, which was located within the curtilage of Riley's home, was not a search because Riley "could not reasonably have expected that his greenhouse was protected from public or official observation from

a helicopter had it been flying within navigable airspace for fixed-wing aircraft." *Id.* at 450-51. Under petitioner's view of *Riley*, expectations of privacy turn on the *location* of an officer. Brief for Petitioner at 30. The problem for petitioner, however, is that a majority of the Court has never endorsed this explanation of *Riley*. Rather, a majority of the *Riley* Court expressly rejected the claim that privacy interests in a home can be defeated if surveillance occurs from a place where an officer has a "right to be."[15] Thus, the court below properly rejected petitioner's argument that Thielen's location was dispositive of whether his observation constituted a search under the Fourth Amendment.

Moreover, petitioner ignores the narrowness of even the plurality opinion in *Riley*. Justice White specifically noted that "we would have a different case" if the helicopter surveillance at issue had been contrary to law or regulation. *Id.* at 451. Here, it is at least arguable that Thielen's conduct violated Minnesota's window-peeping law.[16] In addi-

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[15] *See Riley*, 488 U.S. at 454 (O'Connor, J., concurring)("In determining whether Riley had a reasonable expectation of privacy from aerial observation, the relevant inquiry after *[California v. Ciraolo*, 476 U.S. 207 (1986)], is not whether the helicopter was where it had a right to be under FAA regulations. Rather, consistent with *Katz*, we must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial surveillance was not 'one that society is prepared to recognize as reasonable'")(quoting *Katz*, 389 U.S. at 361); 488 U.S. at 464-65 (Brennan, J., dissenting)("the fundamental inquiry is not whether the police were where they had a right to be under FAA regulations," but rather whether Riley's expectations were defeated by the extent of public observation from aerial observation at 400 feet); *id.* at 467 (Blackmun, J., dissenting)(same).

[16] *See* Minn. Stat. §609.746 (1996)(interference with privacy):

> Any person who enters upon another's property and surrepti-

(continued...)

tion, five of the Justices in *Riley* were careful to disavow the notion that police, once lawfully positioned, have *carte blanche* to monitor the curtilage of one's home.[17] If the police do not have a blank check to monitor the curtilage of one's home from the air, petitioner's theory that officers are completely free to scrutinize the *interior* of a home while standing within inches of a window is implausible.

The *Riley* plurality also acknowledged that the helicopter observation in that case did not interfere with the normal use of the greenhouse or other parts of the curtilage and, most importantly, "no intimate details connected with the use of the home . . . were observed." *Id.* at 452.[18] Of course, the same cannot be said of Officer Thielen's observation. Unlike the airborne inspection upheld in *Riley* and *California v. Ciraolo*, 476 U.S. 207 (1986), and in sharp contrast to the police activities approved in *Dunn* (no Fourth Amendment violation when police trespassed upon property and, while standing outside of the curtilage, looked into defendant's barn), Thielen's surveillance *did* open to police inspection the "intimate details connected with the use of the home." *Riley*, 488 U.S. at 452. This is the critical facet of respondents' case and distinguishes it from the facts in *Riley*, *Dunn*, *Ciraolo*, and *Oliver v. United States*, 466 U.S. 170 (1984)(no search occurred when police entered defendant's "open fields").

Simply put, this Court has never permitted nonconsensual police surveillance that reveals the intimate details of a home to be free of constitutional restraints,[19] even when the

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[16] (...continued)
tiously gazes, stares, or peeps in the window of a house or place of dwelling of another with intent to intrude upon or interfere with the privacy of a member of the household thereof is guilty of a misdemeanor.

The United States ignores this aspect of *Riley*. It contends, citing *United States v. Dunn*, 480 U.S. 294, 297-98, 304 (1987), and *California v. Greenwood*, 486 U.S. 35, 44 (1988), that state law concepts of privacy do not control the existence of expectations of privacy under the Fourth Amendment. Brief for United States at 25, n.6. Although we agree with Justice O'Connor's view that police compliance with statutory and regulatory law alone should not determine whether a particular intrusion violates interests protected by the Fourth Amendment, *see Riley*, 488 U.S. at 453 (O'Connor, J., concurring in judgment)(citations omitted), there may be instances where state law or other governmental regulations may assist the Court in determining the scope of a particular interest protected by the Amendment. *See Rakas*, 439 U.S. at 143, n.12 ("Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society").

Because the *Riley* plurality thought "it is of obvious importance that the helicopter in th[at] case was *not* violating the law," 488 U.S. at 451 (emphasis in original), petitioner and its *amici* cannot now, when discussing the meaning of *Riley*, ignore an aspect of the case that a plurality of the Court deemed important for determining privacy interests under the Fourth Amendment.

[17] *See* 488 U.S. at 451 ("This is not to say that an inspection of the curtilage of a house from an aircraft will always pass muster under the Fourth Amendment simply because the plane is within navigable airspace specified by law"); *id.* at 454 (O'Connor, J., concurring)("The fact that a helicopter could conceivably observe the curtilage at virtually any altitude or angle, without violating FAA regulations, does not in itself mean that an individual has no reasonable expectation of privacy from such observation").

[18] *See also Dow Chemical Co. v. United States*, 476 U.S. 227, 237 n.4 (1986)(emphasis in original)(upholding aerial observation of industrial plant, but finding "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened. Nor is this an area where Dow has made any effort to protect against aerial surveillance").

[19] *Cf. Karo*, 468 U.S. at 716 ("Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a (continued...)

police position themselves just outside the curtilage.[20] The

[19] (...continued)
threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight")(footnote omitted).

[20] The United States, as *amicus*, recognizes that the court below chose not to resolve whether Thielen's observation occurred while inside the curtilage of Thompson's residence, and does not urge this Court to revisit this "fact-intensive determination, which did not form the basis for the ruling below." Brief for United States at 27, n.7. Nevertheless, the United States insists that the lower Minnesota courts correctly found -- relying on the four-factor test of *Dunn*, 480 U.S. at 301 -- that Thielen's observation occurred beyond the curtilage. It also agrees with the view expressed by some lower federal courts "that common areas surrounding garden apartments do not harbor the 'intimate activity' associated with the home," and thus cannot be considered curtilage under the Fourth Amendment. Brief for United States at 27, n.4 (citations omitted).

The United States is wrong to suggest that all curtilage questions are to be resolved by the four-factor test announced in *Dunn*. *See* 480 U.S. at 301 ("We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions"). *Dunn* itself noted that the four factors it considered were the proper analytical tools "only to the degree that, in any given case, they bear upon the centrally relevant consideration -- whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.*

Moreover, the extent of an apartment dweller's curtilage endorsed by the United States is unduly cramped. We agree with the views recently expressed by several judges of the Seventh Circuit that apartment dwellers' curtilage should be defined in a manner that protects their privacy from peeping-tom police officers. *See United States v. Redmon*, 138 F.3d 1109, 1128 (7th Cir. 1998)(*en banc*)(Evans, J., concurring)("In a townhouse complex . . . the curtilage is a bit wider. It includes the garage itself and those areas close to the living unit, particularly places where prying eyes can peer into windows"); *id.* at 1130 (Posner, C.J., dissenting)("The curtilage would rarely extend beyond the house itself if complete, opaque enclosure were required . . . . Most homeowners ex-

(continued...)

location of Thielen's feet cannot and should not be critical. What is critical is that Thielen chose to peer into a private home through gaps in the closed blinds. In doing so, he violated the Fourth Amendment's essential protection, which is "the right to be let alone" from arbitrary and discretionary monitoring by the police. *Olmstead v. United States*, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting).[21]

[20] (...continued)
tend an implicit invitation to social and business invitees to walk up to the front door, but in doing so the homeowner does not, as it were, 'waive curtilage.' The social and business invitee, including a police officer whether invited or uninvited, must confine himself to the prescribed route, rather than treating the invitation as one to roam the property at will, peering into the windows of the home"); *id.* at 1133 (Manion, J., dissenting)("When crossing the property line [of a townhouse] without a warrant . . . , police should be required to overcome the presumption that the property line defines the perimeter of the curtilage where an owner's expectation of privacy begins"); *id.* at 1135 (Rovner, J., dissenting)("I submit that most urban dwellers would be shocked to learn that the portion of a driveway immediately adjacent to the garage door is consider by this court to be an 'open field,' rather than a part of the 'area around the home to which the activity of home life extends'")(citation omitted). If the United States is correct that the location where Officer Thielen peered into Thompson's window is not part of the curtilage of her residence -- "if it is to be classified as an 'open field' -- then no place outside [her] house was within the curtilage, and, indeed, attached houses, row houses, and other cramped urban dwellings have no curtilage (beyond the house itself); curtilage is confined to farmers and to wealthy suburbanites and exurbanites." *Id.* at 1132 (Posner, C.J., dissenting). If this is the law, then "it is hard to imagine a circumstance wherein police will need a warrant short of entering the house itself." *Id.* at 1133 (Manion, J., dissenting).

[21] *See McDonald v. United States*, 335 U.S. 451 (Fourth Amendment violated due to warrantless observation of tenants' room; no significance given to the fact that officer was in the hallway of a roominghouse -- a "common area" -- when he observed private acts inside tenants' room).

B. One's Privacy Interest In A Home Is Not Lost When Intimate Details Are Revealed By Unaided Observations

Petitioner stresses that Officer Thielen's observation of the home was unaided by sophisticated surveillance devices. Although the use of sophisticated surveillance equipment may compromise a legitimate privacy interest, the existence of a privacy interest *ab initio* does not depend upon whether the police employed such equipment. Respondents' privacy interests emanate from their status as guests in a home and from the steps taken to ensure that their private acts within the home would not be revealed to persons outside. Just as the lack of a physical trespass is irrelevant in determining one's conversational privacy, *see Katz*, 389 U.S. at 353, one's privacy in a home does not turn on whether an officer's scrutiny of intimate details inside a home was obtained by conventional methods of surveillance.

Nor should it matter that respondents' private acts were observable by someone peeping through gaps of closed blinds. Concededly, behavior inside a home is not accorded constitutional protection if an officer notices conduct while on the walkway or street near a home.[22] People who do not take sensible precautions to ensure their seclusion "cannot reasonably expect privacy from public observation." *Riley*, 488 U.S. at 454 (O'Connor, J., concurring). But the Court has never required that individuals enclose themselves in sealed and impenetrable houses to guarantee privacy. Reasonableness is the touchstone of Fourth Amendment norms and, in the context of a home, expectations of privacy are established when reasonable methods are taken to avoid

[22] *Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection").

disclosing intimate details to passersby.[23] "To require individuals to completely cover and enclose their curtilage [and homes] is to demand more than the 'precautions customarily taken by those seeking privacy.'" *Id.* (quoting *Rakas*, 439 U.S. at 152 (Powell, J., concurring)). Here, by situating themselves inside premises with closed window blinds, respondents took reasonable methods to ensure their privacy.

To rule that the window-peeping is not a "search" under our Constitution signals "a regression into an Orwellian society in which a citizen, in order to preserve a modicum of privacy, would be compelled to encase himself in a light-tight, air-proof box." *Lorenzana v. Superior Court*, 511 P.2d 33, 41 (Ca.Sup.Ct. 1973). This Court's Fourth Amendment rulings do not require such a drastic result.

[23] *Id.* ("Individuals who seek privacy can take precautions, tailored to the location of the road, to avoid disclosing private activities those who pass by").

CONCLUSION

For the reasons stated above, the judgment of the Minnesota Supreme Court should be affirmed.

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